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No. 13,004

IN THE
United States
Court of Appeals
For the Ninth Circuit

RAOUL A. COSENZA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court,
District of Arizona

FILED

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No. 13004

IN THE

United States
Court of Appeals

For the Ninth Circuit

RAOUL A. COSENZA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court,
District of Arizona

JURISDICTIONAL MATTERS

In the United States District Court for the District of Arizona, Honorable Dave Ling presiding, the appellant Raoul A. Cosenza on April 23, 1951 was adjudged guilty of the offense of violating 18 U.S.C. § 2315 (receiving stolen property) and was adjudged guilty of the offense of violating 18 U.S.C. § 4 (misprision of felony) (T.R. 13). On April 27, 1951 he filed a Notice of Appeal (T.R. 14).

The District Court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF FACTS

Appellant was indicted on two counts. The first count charged that in Phoenix, Arizona he unlawfully received from one George Henry Booth certain jewelry of an approximate value of \$25,000 which had been stolen in Oklahoma City, Oklahoma, "knowing that said jewelry had been stolen as aforesaid and was then and there in interstate commerce," in violation of 18 U.S.C. § 2315 (T.R. 3).¹ The second count charged that he knew that the said Booth had transported in interstate commerce the stolen jewelry and "having actual knowledge of the commission of said felony * * * did, on or about the first day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in said State and District, make known the same to a judge or other person in civil or military authority under the United States of America," in violation of 18 U.S.C. § 4 (T.R. 5).²

(1) Count I of the Indictment reads:

"On or about the 1st day of December, 1949, at the City of Phoenix, State and District of Arizona, Raoul A. Cosenza did unlawfully and feloniously, at one time, receive from one George Henry Booth and conceal certain stolen jewelry, to-wit, two diamond-studded watches, one platinum bracelet set with diamonds, and one diamond platinum pin, all being of the approximate value of \$25,000.00, said jewelry having theretofore been stolen in Oklahoma City, State of Oklahoma, and transported in interstate commerce from the said Oklahoma City, Oklahoma, to Phoenix, Arizona, and the said defendant, Raoul A. Cosenza, then and there well knowing that said jewelry had been stolen as aforesaid and was then and there in interstate commerce."

(2) Count II of the Indictment reads:

"That on or about the 1st day of October, 1949, in the State and

He was tried before a jury and at the close of the evidence moved for a judgment of acquittal on the ground that the evidence was insufficient to justify a verdict of guilt on either count (T.R. 195). The motion was denied (T.R. 195), the case was given to the jury, and it returned a verdict of guilty (T.R. 11).

The government's case rested on the testimony of one witness—George Henry Booth. Its other witnesses testified to facts which were either not disputed or purported facts which had no relevancy to the guilt or innocence of the appellant. Taking the testimony which most strongly supports the prosecution, the following appears.

Booth, an accomplished burglar (T.R. 76), met the appellant sometime in 1947 or early 1948 (T.R. 30) and saw him off and on until the latter part of August, 1949, when, Booth testified, "I told him I was planning on going to the east and see if I could pick up some jewelry, I mean burglarize some places and get some jewelry and I asked him if he thought he might be able to get rid of it. He said

District of Arizona, one George Henry Booth actually committed a crime in violation of Title 18 U.S.C.A. 2314, a felony cognizable by a court of the United States, in that the said George Henry Booth did on or about the said 1st day of October, 1949, transport and cause to be transported in interstate commerce, at one time, certain theretofore stolen jewelry, to-wit, one platinum bracelet set with diamonds, two diamond-studded watches and one diamond platinum pin, all being of the approximate value of \$25,000.00, from Oklahoma City, State of Oklahoma, to the City of Phoenix, State and District of Arizona, and that the said George Henry Booth then knew the said jewelry to have been theretofore stolen as aforesaid; that Raoul A. Cosenza, defendant herein, having actual knowledge of the commission of said felony as above set forth, did, on or about the 1st day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in said State and District, make known the same to a judge or other person in civil or military authority under the United States of America."

he could if I could get anything worthwhile" (T.R. 32). In September, Booth went to Oklahoma City, stole some jewelry (T.R. 36), returned to Phoenix in October and told appellant that he had fifty or sixty thousand dollars worth of jewelry (T.R. 41). Appellant replied "I have some men in mind, some parties in mind, and if you want to sell it we would make a deal on it" (T.R. 41). Thereafter Booth went to Oklahoma and Texas, returning to Phoenix in the latter part of November, 1949 (T.R. 40). On December 1 he met appellant and the two went to Skipper's Bar in Phoenix to show the jewelry to a Mr. Hooper. The jewelry was carried by appellant, because Booth did not "want anything to do with the stuff" (T.R. 42).³ At Skipper's, the appellant, leaving Booth in the bar room, went to Hooper's office in the rear, displayed the jewelry to Hooper, and then called in Booth.⁴ There was no deal (T.R. 43-46); appellant put the jewelry in his pocket, he and Booth went to Booth's car, and appellant handed the jewelry back (T.R. 48). Around May, 1950, it seems, Booth took the jewelry to California and Nevada (T.R. 49, 50). He was apprehended in Reno and pleaded guilty to interstate transportation of stolen property (T.R. 52).

Other facts appear below.

(3) This hardly rings true, coming from a felon who had the bravado to commit burglaries in various states, including some thirty around Phoenix (T.R. 70, 76). Had Booth not testified as he did, there could have been no semblance of a "receiving" on the part of Appellant.

(4) Appellant, who took the stand, denied the material parts of Booth's story (T.R. 128 et seq.).

ISSUES INVOLVED

The issues involved on this appeal relating to the first count of the indictment are: (1) Is the evidence sufficient to sustain the verdict and judgment? This was raised by a motion for judgment of acquittal made at the close of the evidence (T.R. 195). (2) The lower court, in charging the jury, failed to give an instruction on the most essential element constituting the crime for which the appellant was found guilty (T.R. 198). Had proper instructions been given it is inconceivable that the jury would have found guilt. Appellant made no request for the essential instruction. Was the error so grievous and prejudicial that this court will reverse the lower court?

The issue involved relating to the second count raises the question: (3) is the evidence sufficient to sustain the verdict and judgment? This was raised by a motion for judgment of acquittal (T.R. 195).

SPECIFICATIONS OF ERROR

I.

The District Court erred in refusing to grant appellant's motion for a judgment of acquittal on Count One of the indictment; for the evidence was insufficient to sustain the conviction.

II.

The District Court erred in failing to instruct the jury that "before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part

of, or which constitutes interstate commerce.” (See note 8 for the entire instructions on Count One.)

Though no request for such an instruction was made, failure to give such an instruction constitutes such a fundamental and prejudicial error that this court will take notice of it.

III.

The District Court erred in refusing to grant appellant’s motion for judgment of acquittal on Count Two of the Indictment; for the evidence was insufficient to sustain the verdict.

ARGUMENT

I.

The District Court erred in refusing to grant appellant’s motion for a judgment of acquittal on Count One of the indictment; for the evidence was insufficient to sustain the conviction.

A. Facts Are Not Sufficient to Support a Verdict of Guilty of Unlawfully Receiving Stolen Goods Where There Is No Evidence to Show That the Goods Were a Part of Interstate Commerce When Received.

The pertinent part of 18 U.S.C. § 2315 reads:

“Whoever receives, conceals, stores, barter, sells, or disposes of any goods, wares, or merchandise * * * of the value of \$5000 or more * * * *moving as, or which are a part of, or which constitute interstate or foreign commerce,* knowing the same to have been stolen * * * Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.” (Italics added)

When the appellant received the articles of jewelry were they moving as, a part of, or did they “constitute”⁵ inter-

(5) Obviously, goods, wares, and merchandise do not “constitute” interstate commerce. In context, the word is meaningless.

state commerce? There is no evidence upon which the jury could answer the question in the affirmative.

Booth (T.R. 180) and his son (T.R. 72, 175) lived in Phoenix, Arizona, where Booth had been for a "lot of years" (T.R. 53). For a time he was engaged in buying and selling liquor licenses (T.R. 31, 53); later in the business of robbery (T.R. 76). A woman, Lona Lane, apparently his closest companion, also lived and worked there (T.R. 170 *et seq.*). His telephone was at least for a time in her home (T.R. 171). When Booth went to Oklahoma and stole the jewelry (T.R. 36) he had in mind merchandising it in Arizona (T.R. 39). He brought it to Arizona in October, 1949 (T.R. 40) where he hid it (T.R. 48), and took another trip to the east to commit more burglaries (T.R. 66). On his return to Phoenix in the early part of December, 1949, he showed the jewelry to appellant for the first time (T.R. 62). In the interim he had displayed the jewelry to prospective purchasers in the City of Phoenix (T.R. 64).

After Booth confessed to committing his crimes, he pleaded guilty to the transportation of the stolen jewelry in interstate commerce from the State of Oklahoma into the State of Arizona (T.R. 52).

Compare 18 U.S.C. § 2317, relating to receipt of stolen cattle, where the phrase used is "moving in or constituting a part of" interstate commerce; 18 U.S.C. § 659, relating to interstate baggage, uses the phrase "moving as or which are a part of or which constitute an interstate or foreign shipment of freight * * *" Title 18 U.S.C., 1940 ed., § 416 on which § 2315 of the 1948 edition is based (though it has an entirely different consequence) employs the phrase "while moving in or constituting a part of interstate" commerce.

It will be noticed that Count One of the indictment uses none of the phrases found in § 2315. It simply alleges that when appellant received the jewelry it "was then and there in interstate commerce."

Under the authorities it must be concluded that as a matter of law the jewelry had come to rest in Arizona prior to the time of appellant's ephemeral "receiving." There was no evidence to indicate that when the goods were received by the appellant they were moving as, or were a part of, or constituted interstate commerce. And the burden of proof as to that feature rested on the government. So, in *Wolf v. United States*, 7 Cir., 1930, 36 F.2d 450, where the court considered the National Motor Vehicle Theft Act, § 4 (18 U.S.C., 1940 ed., § 408), which is now 18 U.S.C. § 2313,⁶ it said:

"The burden was upon the government to show the car was a part of interstate commerce when defendants received it."

In accord is *McAdams v. United States*, 8 Cir., 1934, 74 F.2d 37 where the court held it to be reversible error because of a refusal to give an instruction to the effect that the burden was on the government to show stolen automobiles, at the time they were received, "were then and there in interstate commerce and transportation."

Davidson v. United States, 8 Cir., 1932, 61 F.2d 250⁷ considers a situation in which a car was stolen in Oklahoma, driven to Kansas City, Missouri where it was stored for a few days, and then delivered to the defendants Brummell and Davidson, who sold it. They were charged with and

(6) Title 18 U.S.C. § 2313 reads:

"Whoever receives, conceals, stores, barter, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be" punished. Because of the lack of cases in point construing § 2315, it is necessary to turn to decisions in which this statute was involved.

(7) Cf. *Parsons v. United States*, 5 Cir., 1951, 188 F.2d 878.

convicted of illegally receiving the car. The Court of Appeals, in reversing, said:

“The destination of the transportation of this car, as disclosed by the evidence, was Kansas City. That destination had been reached several days before Gillette [who had possession of the stolen car] brought the car to these two defendants. Now, then, in determining whether or not the evidence sustains the verdict of guilt as to the third count [unlawfully receiving], it, of course, is not necessary to show that these two defendants knew that the car was moving in interstate commerce when it came into their possession; but it is necessary for the government to prove that at the time the car was received by these defendants, that such car was a part of interstate commerce. Receiving a stolen car that has lost its character as interstate commerce constitutes no crime against the laws of the United States * * * The government has totally failed to sustain this burden of proof, and there is no testimony or circumstances in the record that would support a finding that this car was in interstate commerce at the time it was received by these two defendants. In fact, without some testimony indicating that the destination of this car was Brummell and Davidson, it is entirely consistent with the evidence that the interstate character of this car ceased when it was stored in the garage by Gillette at 1812 Independence Avenue, Kansas City.”

See, also, *Hill v. Sanford*, 5 Cir., 1942, 131 F.2d 417; *United States v. Gardner*, 7 Cir., 1948, 171 F.2d 753; *Cox v. United States*, 8 Cir., 1938, 96 F.2d 41.

The government's own evidence shows that the stolen jewelry had reached its destination in Arizona. It was no longer a part of interstate commerce when appellant received it. Because Booth was unable to dispose of it as he

intended, and then again put it into interstate commerce makes no difference, for the facts existing at the time of the receiving are the controlling element with reference to interstate commerce. *United States v. Gollin*, 3 Cir., 1948, 166 F.2d 123 (same case, 176 F.2d 889).

II.

The District Court erred in failing to instruct the jury that "before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part of, or which constitutes interstate commerce." (See note 8 for the entire instructions on Count One.)

Though no request for such an instruction was made, failure to give such an instruction constitutes such a fundamental and prejudicial error that this court will take notice of it.

B. Where a Court Fails to Instruct the Jury on the Essential Ingredients of the Only Offense upon Which a Conviction Can Rest, the Error Requires Reversal.

In order for the jury to find the appellant guilty of violating 18 U.S.C. § 2315, the jury would have to believe beyond a reasonable doubt that the defendant (1) received goods, wares, or merchandise (2) of a value of \$5000 or more (3) which when he received it was moving as, or which was a part of, or which constituted interstate commerce (4) knowing the jewelry to have been stolen. But the court, as shown in this specification, in effect charged that it was sufficient to support guilt if the jury believed that only elements (1) and (4) existed.⁸ By failing prop-

(8) The instructions in their entirety relating to the first count (which count was read to the jury almost verbatim) are as follows:

"Now, the statute under which that first count is drawn reads as follows:

'Whoever receives or conceals any goods, wares, merchandise of the value of \$5,000.00, or more, moving as, or which

erly to instruct, the court eliminated from the jury's consideration the only element—that of interstate commerce—which could possibly make appellant's conduct an offense against the laws of the United States. Twice the court said, in a negative way, that the appellant could be convicted if the jury believed that he received goods knowing that they had been stolen and knowing they had been transported in interstate commerce.

Admittedly counsel for appellant was at fault in not requesting additional instructions to cover element (3).

are a part of, or which constitute interstate commerce, knowing the same to have been stolen, shall be punished as the act provides.' ”

“ ‘Interstate commerce’ as defined by the Federal statute includes commerce between one state, territory, possession or the District of Columbia, and another state, territory or possession or the District of Columbia.

“By Count 1 of the indictment, the defendant is accused of having unlawfully and feloniously received and concealed certain stolen jewelry, knowing that said jewelry had been stolen and was then and there in interstate commerce.

“The word ‘receive’ as used in the statutes, means to accept, and to ‘accept’ or ‘possess’ means to have control, care and management and not a passing control, fleeting and shadowy in its nature, and before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt, not only that such person knew (230) that such property was stolen and transported in interstate commerce, but that he did receive and conceal it within the meaning of those words which I just defined to you.

“A mere passing, control or a brief, fleeting and shadowy possession of stolen property is not sufficient to justify a verdict of guilty, and unless you are satisfied beyond a reasonable doubt that the defendant in this case received and concealed the stolen jewelry in question, knowing it to have been stolen and transported in interstate commerce, within the meaning of the words of receiving and concealing as I have defined them to you, then your verdict must be not guilty.”

1. AN INSTRUCTION WHICH PERMITS A JURY TO RETURN A VERDICT OF GUILTY TO RECEIVING STOLEN PROPERTY IN AN INTRASTATE TRANSACTION IS A FUNDAMENTAL AND PREJUDICIAL ERROR.

The court's instruction did not state the law. The point was considered in the often-approved case of *Grimsley v. United States*, 5 Cir., 1931, 50 F.2d 509. There, an indictment recited that in violation of Section 4 of the National Motor Vehicle Theft Act (see note 6) the defendant sold a Ford car which he knew was stolen and knew was transported from Oklahoma to Florida. The court held that the indictment did not state an offense, saying:

"It is an essential element of the offense under the fourth Section that the accused receive the motor vehicle while it is moving as, or is a part of, or constitutes, interstate or foreign commerce. The act, as is apparent on the face of it, is based upon the commerce clause of the Constitution, and does not assume to punish one who receives or sells a stolen vehicle after it has ceased to move in, or be a part of, interstate commerce. *Brooks v. United States* (1925), 267 U.S. 432, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407."⁹

Unquestionably, the jury believed that the jewelry in the case at bar was stolen and was transported in interstate commerce. Presumably the jury believed that appellant knew it was stolen and knew that it had been brought to Arizona from another state. But it is hardly conceivable that it believed the appellant received the jewelry while the jewelry was a part of interstate commerce. See the discussion under Specification of Error Number I. If properly instructed, it seems certain that the jury would have brought in a verdict of not guilty. In this respect, see

(9) Sibley, J. dissented but not on the proposition made here.

Booth v. United States, 9 Cir., 1946, 154 F.2d 73. There it is held that a judgment of conviction will be reversed notwithstanding that the evidence is sufficient to sustain the conviction, if it appears that the verdict may have rested upon an erroneous instruction.

In numerous instances, contraband goods have been shipped in interstate commerce, and a defendant has had knowledge thereof and has received such goods. But if the reception is in intrastate commerce, there can be no federal offense. Such is the rule laid down in *Tot v. United States*, 1943, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (reversing *United States v. Tot*, 3 Cir., 1942, 131 F.2d 261). The court examined the Federal Firearms Act, 15 U.S.C. § 902, which, among other things, makes it unlawful for a person convicted of a crime to receive firearms shipped in interstate commerce. The court unanimously agreed that the offense must be confined to receipt as a part of interstate commerce and does not extend to a receipt in an intrastate transaction. See, also, *Minski v. United States*, *Delia v. United States*, 6 Cir., 1942, 131 F.2d 614.

In the *Tot Case*, the Supreme Court said (and approved) :

“Both courts below [in the *Tot* and *Delia Cases*] held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct.”

Supposing that there is some evidence in this case to show that the appellant received the jewelry in interstate

commerce, such evidence would create a question of fact. Being then, a question of fact, it should have been given to the jury to be resolved. *Baugh v. United States*, 9 Cir., 1928, 27 F.2d 257.

2. THE COURT OF APPEALS WILL NOTICE A SERIOUS ERROR WHICH IS PLAINLY PREJUDICIAL EVEN THOUGH IT WAS NOT CALLED TO THE ATTENTION OF THE TRIAL COURT.

Rule 52(b) of the *Rules of Criminal Procedure* reads: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This is a restatement of the prior law. Notes of *Advisory Committee on Rules*, 18 U.S.C., Federal Rules, p. 548.

The court in *Morris v. United States*, 9 Cir., 1946, 156 F.2d 525, 169 A.L.R. 305¹⁰ quoted with approval the following from *Suhay v. United States*, 10 Cir., 1938, 95 F.2d 890:

"* * * Where life or liberty is involved, an appellate court may notice a serious error which is plainly prejudicial even though it was not called to the attention of the trial court in any form."

And this court went on to say:

"In a criminal case, it is always the duty of the court to instruct on all essential questions of law, whether requested or not."

Reference is made to *Screws v. United States*, 1945, 329 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495,¹¹ which contains the

(10) Denman, J. dissented, but not on the principle presented here.

(11) Murphy, J. dissenting.

following language singularly suited to the situation here:

“It is true that no exception was taken to the trial court’s charge. Normally we would under those circumstances not take note of the error * * * But there are exceptions to that rule * * * And *when the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.*” (Italics added.)

In harmony with these axioms is the rule of *Samuel v. United States*, 9 Cir., 1948, 169 F.2d 787.¹² See the annotation in 169 A.L.R. 315; and, generally, 4 *Barron, Federal Practice and Procedure*, Rules Ed. 496, § 2583. * * *

Without doubt, if the attention of the District Court had been directed to the fact that it failed to submit to the jury “the essential ingredients of the only offense on which the conviction could rest”—that is, the necessity of a belief upon the part of the jury that appellant’s receiving was at a time when the jewelry was moving as, or which was a part of, or which constituted interstate commerce—it would have corrected its charge. The court would not have left the jury with the mistaken thought that it could find the appellant guilty even though he received the jewelry in a transaction which was apart from interstate commerce.

But the plain error of the court, appellant’s counsel and the prosecution should not deprive the appellant of his liberty. It is the “law of the land” that he is entitled to a fair trial. *In re Oliver*, 1948, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682.

(12) Cf. *Jackson v. United States*, 6 Cir., 1950, 179 F.2d 842, 181 F.2d 822.

An erroneous instruction may deprive one of a fair trial. *Screws v. United States, supra*. It did in this instance. Consequently this Court should reverse the judgment of the Court below.

III.

The District Court erred in refusing to grant appellant's motion for judgment of acquittal on Count Two of the Indictment; for the evidence was insufficient to sustain the verdict.

C. Facts Are Not Sufficient to Support a Verdict of Guilty of Misprision of Felony Where There Is No Evidence That the Accused Knew That a Federal Offense Had Been Committed or No Evidence That the Accused Actively Concealed the Crime.

The appellant, on count two of the indictment, was found guilty of the offense of violating 18 U.S.C. Sec. 4 (note 2). That statute reads:

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to a judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both."

The crime that he is charged with having knowledge of—Title 18 U.S.C. § 2314—reads, in part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen * * * shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

The witness Booth testified that he pleaded guilty to transporting stolen jewelry from Oklahoma to Arizona

(T.R. 52); and taking the evidence most favorable to the government, appellant knew the jewelry was stolen from outside the state of Arizona, and that he received it. Nevertheless these facts are not sufficient to establish that appellant knew that Booth had committed a felony cognizable by a court of the United States or that he, in any other manner, was guilty of misprision of felony.

1. **THOUGH AN ACCUSED MAY KNOW THAT ANOTHER HAS STOLEN GOODS AND TRANSPORTED THEM IN INTERSTATE COMMERCE, HE CANNOT BE FOUND GUILTY OF MISPRISION OF FELONY UNLESS IT IS SHOWN THAT HE KNEW THAT THE VALUE OF THE GOODS WAS \$5,000 OR MORE.**

There is no evidence, nor can any inference be drawn from the evidence, that the appellant had the slightest knowledge that the stolen jewelry was worth \$5,000 or more. And unless the appellant believed that it had at least that value he could not have known that Booth had committed a federal crime.

The record is silent as to whether or not appellant had any special knowledge as to the value of jewelry. It cannot be inferred that he knew any more about the subject than other laymen. He might have acquired information from Booth, who, assuming that the latter was an expert, would obviously, when trying to sell the jewelry, "puff up" the value. Booth testified that he told appellant it was worth easily \$10,000 (T.R. 71). But, aside from Booth's testimony, the best offer Booth ever received, so far as appellant knew, was \$600 (T.R. 46). As for its actual value, the government's expert witness would say no more than that it was worth in excess of \$5,000 (T.R. 29).¹³

(13) Under 18 U.S.C. § 2315 (receiving stolen property) and various other statutes, it is immaterial as to whether or not the

If the subject dealt with were a common article of trade a jury might "impute" knowledge of its value on the part of appellant, under proper instruction.¹⁴ But where, as here, a highly unique article is involved, that would not be warranted.

Since the element of knowledge of value was essential to knowledge of the commission of a federal crime; and since there was no evidence of knowledge of value, the appellant properly could not have been found guilty of misprision of felony.

2. AN ACCUSED CANNOT BE FOUND GUILTY OF MISPRISION OF FELONY UNLESS HE COMMITTED POSITIVE ACTS CONCEALING THE CRIME OR MISLEADING GOVERNMENT AUTHORITIES.

Counsel for the appellant have not been able to find any cases in which a conviction for the violation of 18 U.S.C. § 4 as a substantive offense has ever been upheld by an appellate court. This is surprising because the statute has been on the books in its present form, so far as pertinent here, for over 160 years.¹⁵ If the statute properly could be

accused knows the value of what he receives (transports, etc.). As shown here, however, knowledge by the accused of the value of what another steals, receives, etc., is material under the misprision of felony statute.

(14) In the instructions to the jury, nothing was said about the point presented here; nor was anything at all said about the value of the jewelry (T.R. 199).

(15) 1 Statutes at Large 113, § 6 reads:

"That if any person or persons having knowledge of the actual commission of the crime of wilful murder or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned

applied to a set of facts like those found in the case at bar, then no doubt its use would be more popular with the government prosecution than is the use of the conspiracy statute, 18 U.S.C. § 88;¹⁶ for, if the government is correct in this case, it would take less proof to support a conviction under § 4 than under § 88.

One of the early cases to consider the pertinent statute is *United States v. Farrar*, D.C. Mass., 1930, 38 F.2d 515. The defendant had purchased intoxicating liquor, the sale of which was prohibited. Said the court:

"The Act of April 30, 1790, as amended (18 U.S.C. § 251 [now § 4]), requires both concealment and failure to disclose. Under it some affirmative act toward the concealment of the felony is necessary. Mere silence after knowledge of the commission of the crime is not sufficient."

not exceeding three years, and fined not exceeding five hundred dollars. [Approved Apr. 30, 1790]."

See 8 *University of Chicago Law Review* (1941), 338, where it is said: "Since the modern police organization has assumed major responsibility for the apprehension of criminals, prosecutions for misprision of felony are almost unknown." This article gives a good history of misprision laws.

(16) In several instances a Court of Appeals has sustained convictions of conspiracy to violate 18 U.S.C. § 4. *Stewart v. United States*, 5 Cir., 1942, 131 F.2d 624 (The facts are not set forth); *Long v. United States*, 10 Cir., 1943, 139 F.2d 652 (Joined with conspiracies to violate liquor laws. Sheriff was paid off by codefendants to inform them when Federal agents were around); *Hall v. United States*, 10 Cir., 1940, 109 F.2d 976 (Joined with conspiracies to violate liquor laws. City officers paid by codefendants for protection and help in escape from Federal agents); *Donovan v. United States*, 3 Cir., 1932, 54 F.2d 193 (Wells, his lawyer Donovan, and Patrone agreed that Patrone would represent himself to be Wells and would serve Wells' sentence on a liquor smuggling charge. Patrone and Donovan appeared in court and Patrone, for Wells, was sentenced).

The *Farrar Case* was affirmed in *Farrar v. United States*, 1930, 281 U.S. 624, 50 S.Ct. 425, 74 L.Ed. 1078, 68 A.L.R. 892. As noted in *Bratton v. United States*, 10 Cir., 1934, 73 F.2d 795:

“While the Supreme Court did not mention this statute, Judge Morton’s opinion called it to the attention of the high court, and if that court had believed that failure to disclose, without more, was a crime, then a reversal must have followed.”

In the *Bratton Case*, the defendants apprehended one Blackburn who illegally had possession of liquor. They released him and agreed not to report his crime to federal authorities if he would promise to pay them \$300. An indictment was returned under 18 U.S.C. 1940 ed., § 251, and the defendants were found guilty. The Court of Appeals reversed, saying:

“Section 146 [of the Criminal Code, 18 U.S.C. § 251] was enacted April 30, 1790 (1 Stat. 113, § 6), and as far as the researches of court and counsel disclose, has been before the courts but twice in the 144 years of its life. It provides that there must be both a concealment and a failure to disclose in order to constitute a criminal offense. The language is ‘conceals and does not as soon as may be disclose.’¹⁷ Some meaning must be given to the words ‘conceal and.’ If it should be held that a failure to disclose is in itself a concealment, then a conviction may be had for a failure to disclose without more, and the words ‘conceal and’ are thus effectively excised from the statute.

“Following settled rules of construction, we must assume that Congress intended something by the use

(17) The relevant part of present law reads: “conceals and does not as soon as possible make known.”

of the words 'conceal and.' If any meaning is to be given them, an indictment must allege something more than mere failure to disclose—some affirmative act of concealment, such as suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime had been committed."

In *Neal v. United States*, 8 Cir., 1939, 102 F.2d 643, the court had these facts before it: John Neal, defendant's brother, stole more than \$100,000 from a national bank over a period of years. John invested sums of money in the defendant's business, the sums being greatly in excess of his income. John then disappeared. The defendant aided in concealing him, "threw dust" in the eyes of the federal authorities, had books of account altered so that they would not show John's investments, and hid from the officers some \$6,000 of John's money. The court held that this was not sufficient upon which to base a conviction on the misprision of felony statute.¹⁸

Decisions from the state courts are not helpful. The offense is now practically obsolete. 1 Burdick, *Law of Crimes* (1946), 444, Sec. 296; 1 Wharton's *Criminal Law* (12th ed.) 376, Sec. 289; *People v. Lefkovitz*, 1940, 294 Mich. 263, 293 N.W. 642; 25 *Marquette Law Review* (1941), 99; and 7 *University of Pittsburgh Law Review* (1941), 246 (where State authorities are collected). The federal definition of the crime is a departure from the common law. 32 *Virginia Law Review* (1945), 170; 54 *Harvard Law Review* (1941), 506. Consequently the decisions under the common law are not in point.

(18) Woodrough, J. dissented on other grounds.

It must be concluded that there was no evidence upon which the jury could find the appellant guilty of misprision of felony.

CONCLUSION

It is respectfully submitted that in view of the foregoing this court should reverse the judgment of the District Court.

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BRIEF FOR APPELLEE

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DEC 21 1951

PAUL P. O'BRIEN

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JURISDICTIONAL MATTERS

Appellant in his brief has correctly stated the jurisdictional matters and Appellee agrees that the District Court has jurisdiction under Title 18, U.S.C., Section 3231 and that this court has jurisdiction under Title 28, U.S.C., Section 1291.

STATEMENT OF FACTS

Appellant was indicted on two counts. The first count charged that in Phoenix, Arizona, he unlawfully received from one George Henry Booth certain jewelry of an approximate value of TWENTY FIVE THOUSAND dollars (\$25,000.00), which had been stolen in Oklahoma City, Oklahoma, knowing that said jewelry had been stolen as aforesaid, and was then and there in "interstate commerce," in violation of Title 18, U.S.C., Section 2315. (T.R. 3).

The second count charged that he knew that the said Booth had transported in interstate commerce the stolen jewelry with actual knowledge of the commission of said felony and further charged that the Appellant did, on or about the first day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible in said State and District, make known the same to a judge or other person in the civil or military authority in the United States of America, in violation of Title 18, U.S.C., Section 4. (T.R. 3 & 4).

Appellant was tried before a jury and at the close of the evidence moved for a judgment of acquittal on the grounds that the evidence was insufficient to justify a verdict of guilty on either count. (T.R. 195). The motion was denied. (T.R. 195). The case was given to the jury and returned a verdict of guilty. (T.R. 11).

The government's case rested on the testimony of witnesses, George Henry Booth, Fred Nichols and Vincent E. Cook. Booth, who had done quite well as a burglar (T.R. 76), met the Appellant sometime in 1947 or early in 1948 (T.R. 30), and saw him off and on until the latter part of August, 1949, and that during that period of time, Booth was associated with the Appellant in selling liquor licenses (T.R. 31). Booth testified that in August or September (T.R. 32) he told Appellant he was planning on going to the East in order to see if he could pick up some jewelry, burglarize some places and get some jewelry, and asked the Appellant if he thought he might be able to get rid of it and he said that he could, "If I could get anything worth while." And he further testified that in the same conversation (T.R. 34), that he told the Appellant that

he was planning on going to the East to see if he could get some jewelry, and if the Appellant could handle it, just like the Appellant always told me; and the Appellant said, "Any time you get anything, I can help you get rid of it, I can help you merchandise it."

In September, Booth went to Oklahoma City, stole some jewelry, (T.R. 36), returned to Phoenix in October and told the Appellant that he had fifty or sixty thousand dollars worth of jewelry. (T.R. 41). Appellant replied, "I have some men in mind, some parties in mind, and if you want to sell it," he says, "we could make a deal on it." (T.R. 41). At that time Appellant asked Booth what his commission would be. Booth further testified that the Appellant told him that he had made arrangements to show the jewelry to a fellow by the name of Skipper, and Appellant wanted to know when Booth could get the jewelry and they made arrangements as to where to meet so that the Appellant could see the jewelry, (T.R. 42), and that the Appellant did meet him at the designated place and looked over all the jewelry and picked out certain pieces which he wanted to show. Booth further testified that after he left Oklahoma he was coming back to see Cosenza to see if they could merchandise it. (T.R. 39). That on or about December 1, Booth met Appellant and the two went to Skipper's Bar in Phoenix to show the jewelry to Mr. Hooper. The jewelry was carried by Appellant because Booth did not want anything to do with the stuff. (T.R. 42). At Skipper's the Appellant, leaving Booth in the barroom, went to Hooper's office in the rear, displayed the jewelry to Hooper and then called Booth in. There was no deal. (T.R. 43-46). Appellant put the jewelry in his pocket and he and Booth went to the Appellant's car which was in a parking lot, and Appellant drove back to where Booth's car was

parked in the vicinity of 17th and that during the ride from Skipper's to where Booth's car was, Appellant had the jewelry in his pocket and he gave it back to Booth when Booth left Appellant's car to get into his own car. Booth further testified (T.R. 49) that shortly after the first visit with Appellant, he took Booth out to South Central and mentioned some fellow's name that was talking to the Appellant about the jewelry; and he took Booth out to talk to the fellow and the fellow wasn't interested and Appellant mentioned he had some more in mind, and that Booth wouldn't let him have the jewelry for Appellant wanted to take it to be used as a sample and Booth did not care for that. (T.R. 49). That Booth took the said jewelry along with other jewelry that he had obtained from Oklahoma City, through Arizona, California and Nevada, (T.R. 51), and finally buried it near Reno, Nevada. (T.R. 50). Booth was apprehended in Reno and pleaded guilty to interstate transportation of stolen property. (T.R. 52).

Witness Fred Nichols, the police officer of the City of Phoenix, Arizona, testified (T.R. 90-91) that he asked Appellant if he knew George Booth, and the Appellant said he did not know Booth, but when presented with a picture of Booth, Appellant then admitted he did know Booth; and Appellant admitted being in company with Booth at the time the jewelry was taken to Skipper's Bar *and that they had taken the jewelry there*, but that Appellant did not know it was stolen nor had any idea it was "hot." (Italics ours.)

Witness Vincent E. Cook, the bartender at Skipper's Bar testified (T.R. 97-98) that about the first of December, 1949, he first saw Booth in the cocktail lounge alone and that he saw Appellant walk through the place

and into the office, which is in the rear of the bar and at that time Booth was still in a booth in the cocktail lounge. (T.R. 98). He further testified, on cross-examination (T.R. 104) that Appellant went into the office first. Appellant categorically denied the testimony of witnesses George Henry Booth and Fred Nichols (T.R. 117-122, 127, 136 and 137), with the exception that he did see the jewelry in Skipper's office, (T.R. 128 and 136).

ISSUES INVOLVED

The issues involved on this appeal relating to the first count of the indictment are:

1. Is the evidence sufficient to sustain the verdict and judgment?

This issue is based upon a motion for judgment of acquittal made by Appellant at the close of the evidence. (T.R. 195).

2. The lower court, in charging the jury, failed to give an instruction on the most essential element constituting a crime for which Appellant was found guilty. (T.R. 198).
3. The third issue involved relates to the second count of the indictment and is based upon a motion for a judgment of acquittal, (T.R. 195), due to the fact that the evidence was not sufficient to sustain the verdict and judgment.

SPECIFICATIONS OF ERROR

Appellant has set forth the following specifications of error in his brief. (App. B. 5 and 6.)

1. The District Court erred in refusing to grant Appellant's motion for a judgment of acquittal on Count I of the indictment; for the evidence was insufficient to sustain the conviction.

2. The District Court erred in failing to instruct the jury that "before a person may be convicted of the crime of receiving and concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part of, or which constitutes interstate commerce." Though no request for such instruction was made, by Appellant, failure to give such instruction constitutes such a fundamental and prejudicial error that this court will take judicial notice of it.
3. The District Court erred in refusing to grant Appellant's motion for judgment of acquittal on Count II of the indictment; for the evidence was insufficient to sustain the verdict.

SUMMARY OF ARGUMENT

In answering Appellant's arguments, we will discuss the points raised in the order in which they are presented in Appellant's brief.

SPECIFICATION OF ERROR NO. I.

(App. B. 5 to 10)

This specification of error has to do with the sufficiency of the evidence to sustain the conviction of Appellant on Count I of the indictment in that there was no evidence to show that the goods were a part of interstate commerce when received by Appellant.

Appellant in his brief, pages 6 and 7, asks the question — when the Appellant received the articles of jewelry were they moving as, a part of, or did they constitute interstate commerce? And then answers his own question by stating that there is no evidence upon which the jury could answer the question in the affirmative. Appellee believes that Appellant has over-

looked some salient facts that are most persuasive in favor of Appellee's position that the evidence was sufficient to show the jewelry constituted interstate commerce at the time Appellant took possession of it from Booth, (T.R. 42-43), and carried it to Skipper's Bar and there with Booth displayed it to Robert S. Hooper (T.R. 46), and thereafter Appellant carried the jewelry out of Skipper's Bar (T.R. 47) and subsequently returned it to Booth when they reached 17th, the place where Booth's car was parked. (T.R. 48).

There can be no doubt that Booth obtained the jewelry by means of burglaries in Oklahoma and transported it in interstate commerce from there to Phoenix, Arizona, with the specific intent of delivering it to Appellant for merchandising, (T.R. 39), and therefore the jewelry constituted interstate commerce up until on or about the first day of December, 1949, when it was delivered to Appellant at which time he took it to Skipper's Bar in Phoenix, Arizona; then and only then can it be maintained that the jewelry ceased to constitute interstate commerce.

Appellee believes that the following cases sustain the position of the government on this point:

McNalley v. Hill—69 Fed. 2nd 38 (3rd Cir.)

This case sustains the position of Appellee for it holds that where a sale of a stolen automobile is the last step of interstate transportation in furtherance of a scheme unlawfully to dispose thereof, the sale partakes of "interstate commerce" character, giving federal courts jurisdiction to try the offense though vehicle has come to rest before sale. This case arose under Section 4 of Title 18, U.S.C., Section 408, now 18 U.S.C.A., Section 2313. The reasoning upon which the court bases its decision is found under syllabus 2, page 40 of the opinion and we quote:

“Looking at the subject matter of the statute, it is certain there comes a time in the transportation of a stolen motor vehicle from one state to another when, reaching its journey’s end, the motor vehicle stops and transportation ceases. If, at that moment, it loses its quality of “moving as” or “which is a part of” or “which constitutes” interstate commerce, then always would it be impossible to enforce the 4th Section of the statute against the concealment or sale of a car so described. Plainly the statute contemplates a situation where the sale is an incident to something that has gone before, the “final step” of several that have preceded it, such as theft and transportation, and when the sale is so tied up with the interstate transportation in furtherance of the scheme unlawfully to dispose of the stolen vehicle and constitutes the last step thereof, the characteristic of interstate commerce is preserved and the federal jurisdiction for trying the offense of sale is maintained. Section 4.

“This must be true, for the Congress meant something by prescribing as an offense the sale of a stolen motor vehicle which is impressed with the characteristic of interstate commerce. Manifestly it did not, by the 4th Section of the Act dealing with sale of an unlawfully transported motor vehicle, intend the absurd thing of denouncing a sale only when the wheels of the vehicle are turning in interstate transportation. Forbidding the sale of a stolen vehicle only when actually in transit or in motion or in flight is not sense. The Congress intended a sale of a stolen motor vehicle which, having been unlawfully moved in interstate commerce and coming to rest, continues so closely related to that commerce as to remain “a part of” it. When an indictment and the proofs show such to be the fact, the statute gives jurisdiction to a federal District Court to try the case and punish the offender, not exclusively in the jurisdiction where the transaction was completed by sale, or in the

jurisdiction in which it had its inception by theft, but 'in any district in or through which such motor vehicle has been transported.'"

The facts of the instant case clearly fall within the purview of *McNally v. Hill*, supra, for the delivery of the jewelry by Booth to Cosenza for merchandising was a part of the scheme from the inception and was the final step of the several elements of the crime that preceded the turning over of the jewelry to Cosenza in Phoenix, Arizona, for disposal. The Appellant cites in his brief, pages 8 and 9, *Davidson v. United States*, 61 Fed. 2nd 250, which considers the situation wherein a car was stolen in Oklahoma and driven to Kansas City, Missouri, and stored for a few days, and then delivered to the defendants Brommel and Davidson. They were charged with and convicted of illegally receiving the car under Title 18, U.S.C., Section 2313, which reads as follows:

"Whoever receives, conceals, stores, barter, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be * * *" punished.

From the reading of the last mentioned statute it is obvious that it is similar to said Title 18, U.S.C., 2315, under which the Appellant was prosecuted and convicted.

The Court of Appeals in reversing the case held, on page 255 of its opinion, that because the government failed to produce evidence indicating that the destination was Brommel and Davidson, and that the interstate character ceased when it was stored, we can then logically infer from the opinion that had the evidence pointed to the fact, that had the car been stolen and

transported in interstate commerce with its destination Brommel and Davidson, the judgment would have been affirmed.

In reading the Davidson case, *supra*, in the light of the facts in this appeal it is obvious that the testimony of the government was ample upon which the jury could answer the question under consideration in the affirmative as it did.

It is the position of Appellee that temporary interruption does not take a shipment out of interstate commerce, and in support thereof, Appellee cites the case of

United States v. Gollin, 166 Fed. 2nd 123

at page 125 thereof, where the court cites *Hughes Bros. v. Minnesota*, 272 U.S. 469, at page 476, and quotes from that opinion as follows:

“The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation

* * *. And the temporary stoppage of commerce on its way to the ultimate customer does not destroy the interstate commerce movement.”

Other cases so holding are:

United States v. General Motors, 121 Fed. 2nd 376 at 401. (7th Cir.)

Local 167 v. United States, 291 U. S. 293 at 297

Appellant in his argument on this point cites the case of

McAdams v. United States, (8th Cir.) 1934, 74 Fed. 2nd 37

but Appellee does not see that it is applicable for the reason that it is based upon the refusal of the court to give an instruction requested by Appellant in that case, and for that reason it is not in point in any issue under Appellant's Argument No. I.

Appellant also cites in his brief, page 9, the cases of

Hill v. Sanford, (5th Cir.) 131 Fed. 2nd 417

United States v. Gardner (7th Cir.) 171 Fed. 2nd,
753

Cox v. United States, (8th Cir.) 96 Fed. 2nd, 41.

The case of *Hill v. Sanford* is not in point for it was presented upon a collateral attack on the sentences by habeas corpus and decides no issue appertaining to Appellant's Argument No. I.

A reading of the case *United States v. Gardner* will show the appellate court was correct in reversing the judgment of a lower court for it is obvious there was not sufficient evidence upon which the defendant could be connected with the crime and serves no useful purpose in determining any issue on this issue.

The case of *Cox v. United States* is of no help for the evidence failed to show that the car in question was stolen, and the court rightfully set aside the judgment of the lower court.

Certainly there can be no question in the instant case that the jewelry was stolen in Oklahoma and transported to Phoenix, Arizona, for the specific purpose of delivery to the Appellant. Appellant contends (T.R. 156) that at no time did he ever engage in any law violation with Booth. However, Appellee contends that the relationship existing between Booth and Appellant in the sale of liquor licenses (T.R. 31 and T.R.

118), and in the disposal of zircons precludes ignorance of each other's resources and compels a finding of guilty knowledge on the part of the Appellant with respect to the jewelry in question.

Appellee believes that the testimony is ample to sustain the allegations of its first count of the indictment and that the court did not err in denying Appellant's motion for a judgment of acquittal on Count I of the indictment.

SPECIFICATION OF ERROR NO. II

(App. B. 5, 10 to 16.)

This specification of error rests upon the theory that the district court erred in failing to instruct the jury that

“Before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt that such property is received or concealed when moving as, or which is a part of, or which constitutes interstate commerce.”

And though no request for such an instruction was made, failure to give such an instruction constitutes such a fundamentally judicial error that this Court will take notice of it.

Under this specification of error Appellant has very carefully and properly set forth most of the instructions of the court appertaining to the first count of the indictment. In order to shorten Appellee's brief we will refer to the instructions as set forth in Appellant's brief on pages 10 and 11 thereof.

However, Appellee believes that the Court's attention should be called to a part of the trial court's instructions found on page 200 of the Transcript of Record, and we quote,

“Now, by the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until all the evidence introduced on behalf of the government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged * * *.”

In reading the court's instructions it will be found that the court instructed in the language of the statute, in fact, read the statute verbatim, as well as Count I of the indictment, and also read to the jury the statutory definition of “interstate commerce,” and then further instructed (T.R. 200) as follows, and we quote,

“A defendant is presumed to be innocent at all stages of the proceedings *until the evidence introduced on behalf of the government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged.*” (Italics ours.)

How much more is required, especially when Appellant did not request that such an instruction be given? Must we assume that the jury collectively were of such mentality that they were unable to understand what the court meant by his instructions, considering that the court read Count I of the indictment which contained the material element of the offense, that the defendant *then and there knew the said jewelry had been stolen and was then and there in interstate commerce?* (Italics ours.)

It was not difficult from the evidence, and the instructions of the court, for the jury to find that the burglar, Booth, intended to carry the stolen jewelry from one state to another in order to dispose of it and

therefore the jewelry was a part of interstate commerce until it was so carefully laid to rest some fourteen miles East of Reno, Nevada, where it remained until it was "dug up" on May 26, 1950. (T.R. 87).

It is hard to conceive how, had the court given the instruction Appellant contends he should have given, the jury would have arrived upon a different verdict from the one they returned.

It is axiomatic that the element of whether or not the jewelry was in interstate commerce at the time Appellant received same from Booth is a fact that had to be presented to the jury for its determination, and this question was submitted to the jury under instructions in the language of the appropriate statutes and the wording of the indictment with no request for a more specific instruction and therefore Appellant has no right to complain in the Appellate court.

Appellee believes that the case of

Baugh v. United States, 27 Fed. 2nd 257 (9th Cir.) is in point. This case holds, under syllabus 6, that in a prosecution for receiving and concealing a stolen automobile transported in interstate commerce, and for a conspiracy to commit such crimes, the question of when the car ceased to be in interstate commerce was held for the jury. And we quote from the opinion on page 261 as follows:

"It is also assigned as error that the court failed to instruct the jury that, to constitute the offense defined by Section 4 of the Vehicle Theft Act, Appellant must have had knowledge, at the time he received the car, that it had been stolen; for, as argued, the vehicle then ceased to be in interstate commerce. The court did repeatedly instruct substantially in the language of the statute, and upon

the record we do not deem it necessary to determine to what extent a proper request would have imposed the duty of amplification. The question when a stolen vehicle which has been transported in violation of Section 3 of the act ceases to be the subject of criminal concealment, as defined in Section 4, is not free from difficulty * * *, and because of the difficulty of formulating a general rule the attempt should await the necessity.

The evidence tending to show that the car was in interstate commerce up to the time Appellant received and stored it, and that he then had knowledge of its having been stolen, was sufficient to require those issues to be submitted to the jury. In defendant's requests for instructions upon the point the court was asked to declare peremptorily that when Appellant received the car it ceased to be in interstate commerce. But under the circumstances in evidence that was clearly a question of fact for the jury. With some plausibility it could be argued that, if Appellant bought the car outright for his own use and had thereupon put it into service, the transaction would have operated to terminate the interstate character; but on the witness stand he stoutly denied that he bought the car at all, asserting that he took it only as security for a loan for \$400.00, and that it was subject to redemption by Miller; and in fact he never put it into use."

It must be remembered that the Appellant, Cosenza, in this case took the stand and denied that he had ever had anything to do with the jewelry other than what happened at the Skipper's Bar. The Baugh case, *supra*, is cited with approval in the opinion of

Parsons v. United States, 188 Fed. 2nd 878. The *Parsons* case refused to follow the reasoning of *Davidson v. United States*, *supra*, and on page 879 of the opinion states as follows, and we quote,

“Whatever may have been the state of earlier views, and at some times and places they tended to be consonant with appellant’s technical views, it is a long time now since weighty matters of this kind as to law observance and law enforcement have been dealt with, as contended for here, as matters of hair splitting and tithing, mint, anise and cummin.”

Appellant on page 14, paragraph 2 of his Specification of Error No. 2 relies upon Rule 52(b) of the Rules of Criminal Procedure which reads,

“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”

Appellee has no fault to find with the rule that where life or liberty is involved, and Appellate courts may notice a serious error which is *plainly* prejudicial even though it was not called to the attention of the trial court. (Italics ours.)

The government does not believe that the case now before the Court falls within the category of the cases cited by Appellant under this point; for to say that the trial court committed a *plain* error, in not instructing the jury as Appellant claims it should have, would be giving credence to a mere afterthought of Appellant, especially when there was no request for any such charge.

In fact, the position of Appellant falls within the language and thought of Mr. Justice Frankfurter in his concurring opinion in the case of

Johnson v. United States, 318 U.S. 189
and we quote from the pertinent parts thereof commencing at page 202 as follows:

“In reviewing criminal cases, it is particularly important for Appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution * * *. That the defendant’s senior counsel, a lawyer of long experience in federal criminal practice, did not take exception to the manner in which Judge Maris tempered concern for the proper administration of justice with solicitude for the rights of the defendant, indicates not “waiver” of a right which had been denied but recognition that the action of the trial judge was unexceptionable. The claim that the trial was conducted improperly is obviously an afterthought. Only after conviction and in an effort to upset the jury’s verdict on appeal was the fair conduct of the trial court sought to be distorted into an impropriety.”

Appellee in support of its contention that the Appellant has no right to complain in the Appellate court cites Rule 30, Instructions, Title 18 Federal Rules of Criminal Procedure at page 309. Rule 30, Instruction,

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his

objection. Opportunity shall be given to make the objection out of the hearing of the jury.’’

Appellee in support of its premise on this matter cites the following cases which hold that an instruction must be excepted to before the case is submitted to the jury in order to be available on appeal.

Jackson v. United States, 179 Fed. 2nd 842, (6th Cir.)

Ziegler v. United States, 174 Fed. 2nd 439, (9th Cir.)

Bloch v. United States, 261 Fed. 321 (5th Cir.)

Shockley v. United States, 166 Fed. 2nd 704 at 718, (9th Cir.)

Goldstein v. United States, 73 Fed. 2nd 804, (9th Cir.)

Nemec v. United States, 178 Fed. 2nd 656, (9th Cir.)

Fredrick v. United States, 163 Fed. 2nd 536, (9th Cir.)

The last mentioned case on page 549 of the opinion under syllabus 18 states that it has long been the settled rule in federal courts that an instruction by the court must be excepted to before the case is submitted to the jury in order to be availed of on appeal; and further holds that this is no merely technical requirement, but is founded upon reason, justice and expediency, and if the error is seasonably called to the court’s attention, the court can correct it forthwith and thus obviate the necessity of a new trial.

Appellee contends that there was no *plain* or other error committed on the part of the trial court under its instructions to the jury on Count I of the indictment. (Italics ours.)

SPECIFICATION OF ERROR NO. III.
(App. B. 16 to 22)

Appellant maintains under this specification of error that the court erred in refusing to grant Appellant's motion for judgment of acquittal on Count II of the indictment; for the evidence was insufficient to sustain the verdict.

Appellant under "C" and "C-1" contends that there was no evidence to prove that the Appellant knew a federal offense had been committed or no evidence to show that accused actively concealed the crime.

To answer these arguments it would be necessary to again review the bulk of the testimony, but Appellee, from what has been pointed out in its brief on Specifications of Error Nos. I and II, deems it not necessary, and in closing on these two points claims that the evidence is ample to show beyond a reasonable doubt that Appellant not only knew a federal crime had been committed but actually encouraged and supported the theft of the jewelry in Oklahoma and its transportation to Phoenix, Arizona, for disposal.

The Appellant was charged in Count II of the indictment of violating 18 U.S.C. 4. Count II of the indictment reads,

"That on or about the 1st day of October, 1949, in the State and District of Arizona, one George Henry Booth actually committed a crime in violation of Title 18, U.S.C. 2314, a felony cognizable by a court of the United States, in that the said George Henry Booth did on or about the said 1st day of October, 1949, transport and cause to be transported in interstate commerce, at one time, certain theretofore stolen jewelry, to-wit, one platinum bracelet set with diamonds, two diamond studded

watches and one diamond-platinum pin, all being in the approximate value of \$25,000.00, from Oklahoma City, State of Oklahoma, to the City of Phoenix, State and District of Arizona, and that the said George Henry Booth then knew the said jewelry to have been theretofore stolen as aforesaid; that Raoul A. Cosenza, defendant herein, having actual knowledge of the commission of said felony as above set forth, did, on or about the 1st day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in said State and District, make known the same to a judge or other person in civil or military authority under the United States of America.”

Title 18, U.S.C. 4, reads as follows:

“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500.00 or imprisoned not more than three years, or both.”

In said Count II the Appellant is charged with having knowledge of a violation of Title 18, U.S.C. Section 2314, which reads in part as follows:

“Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money of the value of \$5,000.00 or more, knowing the same to have been stolen * * * shall be fined not more than \$10,000.00 or imprisoned not more than 10 years, or both.”

Appellant on page 18 of his brief, 2, states that an accused cannot be found guilty of misprision of felony unless he committed positive acts, concealed the crime or misleads government authorities. Under this head-

ing Appellant claims that he has been unable to find any cases in which the conviction for the violation of 18 U.S.C. Par. 4, as a substantive offense, has ever been upheld by an Appellate court. He further maintains that this is a surprising fact situation on account of the long period of time that the statute has been on the books in its present form.

The reason why the statute has not been more frequently used is not a matter for this court and we can only keep in mind that it is still on the statute books and a serious federal offense.

Appellant cites the case of the *United States v. Farrar*, 38 Fed. 2nd 515, in support of his position. We have no quarrel with that case for it states the correct rule and we do not disagree with the court wherein it held that there is a requirement that both concealment and failure to disclose are necessary elements in the proof of a violation of misprision of felony. In the *Farrar* case the defendant did nothing to conceal the crime or take any part in the concealment of the crime. They merely kept silent.

Appellant also cites the case of *Bratton v. United States*, 73 Fed. 2nd 795. The basis for decision in this particular case was that there was no effort on the part of the defendant to conceal the crime. They merely kept silent.

Appellant on page 21 of his brief cites the case of *Neal v. United States*, 102 Fed. 2nd 643, and therein states that the following facts were before the court:

“John Neal, defendant’s brother, stole more than \$100,000.00 from a national bank over a period of years. John invested sums of money in the defendant’s business, the sums being greatly in excess of his income, John then disappeared. The de-

fendant aided in concealing him, "threw dust" into the eyes of the federal authorities, had books of accounts altered so that it would not show John's investments, and hid from the officers some \$6,000.00 of John's money. The court held that this was not sufficient upon which to base a conviction on the misprision of felony statute."

The court did have those facts before it, but in reading the opinion of the court in the Neal case, at page 645, it will be found that in the second Count of the indictment it was alleged that on or about January 7, 1938, the defendant had committed the crime of misprision of felony in that with full knowledge of the felony committed by John L. Neal, he concealed and failed to disclose and make known such felony as soon as might be to some of the judges of the United States District Court of Minnesota, or to the Attorney General of the United States or to the United States Attorneys or to other persons in civil authority. It is further charged that the defendant took two affirmative steps to conceal the crime committed by his brother John; first, he concealed \$5,903.00 of the stolen money in a golf bag at his living quarters; and, second, he altered and expunged from the account books of the Neal Funeral Home operated by him, entries showing the investment therein by John L. Neal of the stolen monies. On page 647 of the opinion we find this language:

"The proof does not show when the \$5,903.00 was placed in the old iron box by John. John's salary was only \$140.00 a month. Over a period of seven years he stole approximately \$118,000.00. During 1937 he stole \$53,000.00 of this sum, and after August 24th, of that year he had taken approximately \$18,000.00 of the amount. The money stolen prior to August 24, 1937, did not constitute a federal offense, and the stealing of money prior to that date, is not charged to be a crime in the indictment.

The defendant's testimony is that when he opened the iron box on December 28, 1937, the paper money contained in it appeared to be old and was covered with a thick layer of dust. Early in January, 1938, the money was turned over to the officers, and they do not deny defendant's testimony in reference to its condition. The money consisted of 813 one-dollar bills and \$5,090.00 of five, ten, twenty and fifty dollar bills."

At the bottom of page 649 of the opinion we find this language and we quote,

"We next consider the charge in the indictment that the defendant did two affirmative acts to "conceal" the crime of the principal. The first act charged was that he concealed \$5,903.00 in a golf bag, "which moneys unlawfully and feloniously had been taken and carried away by the said John L. Neal, with intent to steal the same, from the possession of" the bank; and, second, that he knowingly altered and expunged from the books of account of the Neal Funeral Home entries showing * * *" John L. Neal's investment of the stolen moneys in that business. "There are only two entries in the books showing investments of John L. Neal in the funeral business after August 24, 1937. One of these shows that on October 15, 1937, he "advanced" \$125.00 and the other that on October 19th, he "advanced" the further sum of \$100.00. There is no evidence whatever connecting these sums with the money unlawfully taken and carried away from the bank; and the amount is not sufficient to raise a presumption of fact that they were not honest savings from his salary."

It is obvious from reading the Neal case that the reasons for the court's decision was the fact that there was no proof that the said sum of \$5,903.00 was a part of the actual money stolen from the bank by John L. Neal, neither was there evidence to show that the items

expunged from the books of the funeral business was a part of the stolen money.

Certainly the Neal case is no help to Appellant when the facts in that case are read in the light of the evidence in the instant case with respect to Count II of the indictment.

In this case now on appeal before this honorable court there is sufficient evidence to prove that the Appellant not only knew that Booth was going to go East to commit burglaries to obtain jewelry and bring it back to Phoenix, Arizona, so Appellant could help dispose of it; especially when Appellant told Booth that he would help him merchandise it providing Booth obtained anything worth while and the further fact that Appellant carried the jewelry to Skipper's Bar in Phoenix, Arizona, where it was displayed, not in the open, but in a back office.

If the jury believed the testimony of Booth and the other government witnesses, which they undoubtedly did, it seems absurd to ask this court to set aside the verdict of the jury and the judgment of the court on Count II of the indictment.

Had Appellant notified the proper authorities of the crime committed by Booth he would not have been charged with the crime of misprision of felony.

SUMMARY

1. The court did not err in denying Appellant's motion for a judgment of acquittal on Count I of the indictment.
2. The court did not err in its instructions to the jury.
3. The court did not err in denying Appellant's motion for a judgment of acquittal on Count II of the indictment.
4. Appellant had a fair and impartial trial and the verdict and judgments should be affirmed.

Respectfully submitted,

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No. 13,004

IN THE
United States
Court of Appeals

For the Ninth Circuit

RAOUL A. COSENZA,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Closing Brief

Appeal from the United States District Court,
District of Arizona

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STATEMENT OF FACTS

The government's brief creates the impression that the appellant was an accessory to Booth's offense of stealing jewelry and transporting it to Arizona. Not only are there no facts to support this but the contrary is the truth. Booth had made up his mind and laid his plans to go east and commit the burglaries before he ever talked with appellant

(T.R. 32). The robbery was committed in August, 1949 (T.R. 36); and the jewelry brought to Phoenix (T.R. 38). Prior to the time appellant saw it in December (T.R. 43), Booth had tried to dispose of it through others in Phoenix (T.R. 64). The relationship of appellant to Booth was not that of an accomplice as the government seems to contend. As a matter of fact, when Booth's testimony is read in its entirety (T.R. 30 *et seq.*), it is obvious that Booth had only "disgust" for appellant as a partner in crime and never believed that appellant could help him dispose of the jewelry.

ARGUMENT

I.

There Is No Evidence to Show That the Goods Were a Part of Interstate Commerce When Received

Appellee attempts to justify its position that a Federal crime was committed because

"* * * the jewelry constituted interstate commerce up until on or about the first day of December, 1949, when it was delivered to Appellant at which time he took it to Skipper's Bar in Phoenix, Arizona; then and only then can it be maintained that the jewelry ceased to constitute interstate commerce [Appellee's Brief, p. 7]."

Following this line of reasoning, it would be more logical to say that the jewelry "ceased to constitute interstate commerce" when Booth presented the jewelry to others for sale prior to the time he showed it to appellant (T.R. 64). Booth brought it to Phoenix where he lived, and left it there while he went about his business (T.R. 60). The jewelry had come to rest.

McNally v. Hill, 3 Cir., 1934, 69 F.2d 38, cited by appellee is not in point. As is shown in the opinion of the Supreme Court, 293 U.S. 131, 79 L.ed. 238, 55 S.Ct. 24, the only question determined by the lower court was: did the indictment charge a Federal offense? The evidence was not considered by the court; and the court presumed that it was sufficient to support the verdict of guilt.

Appellee also cites *United States v. Gollin*, 3 Cir., 1948, 166 F.2d 123. There the court held that where goods begin their interstate journey, because the owner has the power to divert the shipment does not take the shipment out of such commerce. The Court of Appeals reversed a judgment of conviction because the lower court directed the jury to find that the goods involved were moving in interstate commerce. But that is a question for the jury to determine. In the case at bar, the court committed the same error for it took away the right of the jury to determine the question by failing to instruct that the appellant could be found guilty only if the jury found that the goods were moving in interstate commerce when the appellant received them.

Hughes Bros. Timber Co. v. State of Minnesota (1926), 272 U.S. 469, 71 L.ed. 359, 47 S.Ct. 170 (a tax case); *United States v. General Motors Corporation*, 7 Cir., 1941, 121 F.2d 376 (dealing with the Sherman Anti-Trust Act); and *Local 167 of I. B. of Teamsters v. United States* (1934), 291 U.S. 293, 78 L.ed. 804, 54 S.Ct. 396 (also dealing with monopolies) are so far afield that it merely confuses the issues to discuss them.

The Court Should Have Instructed the Jury That in Order to Return a Verdict of Guilty the Jury Would Have to Find That the Goods Were a Part of Interstate Commerce When Received.

The appellee concedes that whether or not the jewelry was a part of interstate commerce when it was "received" by the appellant is a question of fact. Therefore, it should have been submitted to the jury as was done in *Baugh v. United States*, 9 Cir., 1928, 27 F.2d 257.

The appellee also concedes that the court's instructions (except for reading the indictment and the statutes¹) were erroneous. This resolves the problem to the one question: was the error plain and prejudicial? It is again submitted that this error requires reversal.

The law as stated in the cases cited at page 18 of Appellee's Brief is good law. The cases state the general rule that an objection must be made to an erroneous instruction if the error is to be relied upon in seeking a reversal. It is the exception to the rule, as stated in *Screws v. United States*, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.ed. 1495, 1505,² upon which the appellant relies. Incidentally, such is the rule in Arizona. See *State v. Betts*, 1951, 71 Ariz. 362, 227 P.2d 749, where the court said:

"* * * it is the duty of the court in criminal cases to give instructions on the general, fundamental principles of the law pertaining to the offense charged."

(1) The court gave the so-called statutory definition of "Interstate commerce" found in 18 U.S.C. § 10 (see note 8, page 11 of the opening brief). It could not have been helpful to the jury, for it does not explain the meaning of the term.

(2) The citation to the United States Reports given in the opening brief is erroneous.

III.

**The Facts Are Not Sufficient to Establish
the Offense of Misprision of Felony**

The appellee recites that the appellant "actually encouraged and supported the theft of jewelry in Oklahoma (Brief, p. 19)." As pointed out before this is not a fact. Assuming it were the truth for the sake of the argument under this assignment of error, the following anomalous situation springs up: D causes X to commit a felony in violation of a Federal statute, thereby becoming a principal under 18 U.S.C. § 2. On gaining knowledge that the felony has actually been committed, D, according to appellee, violates 18 U.S.C. § 4 (the misprision statute) if he does not as soon as possible make the crime known to the government. In other words, it is argued, that § 4 compels a person to abandon the privilege against self-incrimination conferred upon him by the Fifth Amendment to the Constitution. Obviously, such is not the law.

For this reason and those set forth in the opening brief, it is submitted that the verdict of guilty on the second count of the indictment should be reversed.

CONCLUSION

In the interests of justice, it is respectfully submitted that this Court should reverse the judgment of the District Court.

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No. 13004

United States
Court of Appeals
For the Ninth Circuit.

RAOUL A. COSENZA,

Appellant.

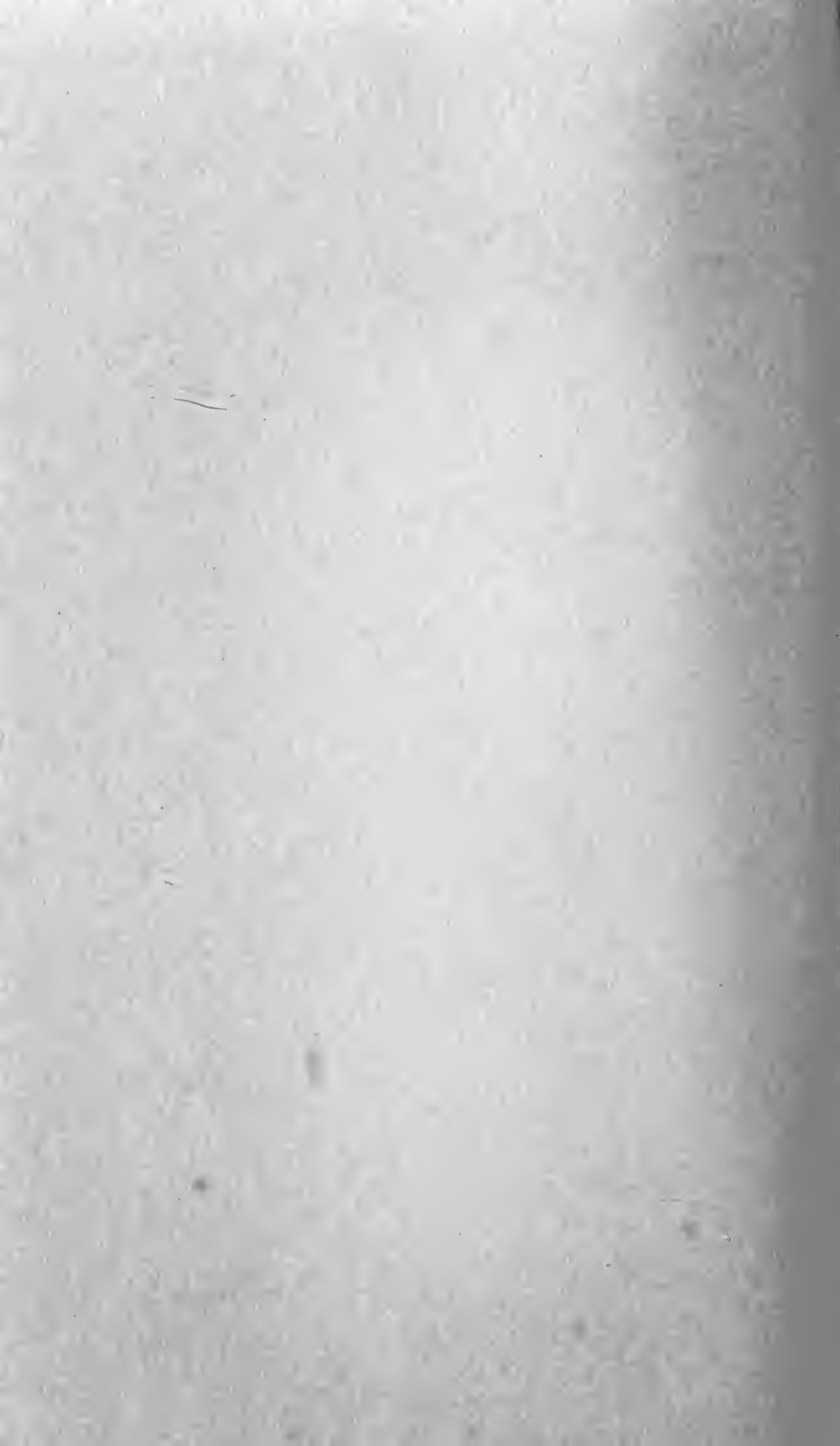
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Attorney for Appellant.

FRANK E. FLYNN,
United States Attorney,

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Assistant United States Attorney,
Federal Courthouse Building,
Phoenix, Arizona,
Attorneys for Appellee.

In the United States District Court
For the District of Arizona

No. C-9426 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAOUL A. COSENZA,

Defendant.

INDICTMENT

Violation: 18 U.S.C.A. 2315
(Receiving Stolen Property in Interstate
Commerce)

18 U.S.C.A. 4
(Misprision of Felony)

The Grand Jury Charges:

Count I.
(18 U.S.C.A. 2315)

On or about the 1st day of December, 1949, at the City of Phoenix, State and District of Arizona, Raoul A. Cosenza did unlawfully and feloniously, at one time, receive from one George Henry Booth and conceal certain stolen jewelry, to wit, two diamond-studded watches, one platinum bracelet set with diamonds, and one diamond patinum pin, all being of the approximate value of \$25,000.00, said jewelry having theretofore been stolen in Oklahoma City, State of Oklahoma, and transported in

interstate commerce from the said Oklahoma City, Oklahoma, to Phoenix, Arizona, and the said defendant, Raoul A. Cosenza, then and there well knowing that said jewelry had been stolen as aforesaid and was then and there in interstate commerce.

Count II.

(18 U.S.C.A. 4)

That on or about the 1st day of October, 1949, in the State and District of Arizona, one George Henry Booth actually committed a crime in violation of Title 18 U.S.C.A. 2314, a felony cognizable by a court of the United States, in that the said George Henry Booth did on or about the said 1st day of October, 1949, transport and cause to be transported in interstate commerce, at one time, certain theretofore stolen jewelry, to wit, one platinum bracelet set with diamonds, two diamond-studded watches and one diamond platinum pin, all being of the approximate value of \$25,000.00, from Oklahoma City, State of Oklahoma, to the City of Phoenix, State and District of Arizona, and that the said George Henry Booth then knew the said jewelry to have been theretofore stolen as aforesaid; that Raoul A. Cosenza, defendant herein, having actual knowledge of the commission of said felony as above set forth, did, on or about the 1st day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in said State and Dis-

trict, make known the same to a judge or other person in civil or military authority under the United States of America.

A True Bill.

/s/ FLOYD WILLIAMS, JR.,
Foreman.

/s/ F. E. FLYNN,
United States Attorney for
The District of Arizona.

[Endorsed]: Filed December 15, 1950.

In the United States District Court
For the District of Arizona

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF
MONDAY, JANUARY 8, 1951

This case comes on regularly for arraignment this date. The defendant is present in person with his counsel W. T. Choisser, Esquire, who appears on behalf of George Wilson, Esquire, counsel for defendant. The defendant is now duly arraigned. The defendant waives the reading of the indictment and a copy thereof is handed to him, and he is

\

called upon to plead. The defendant's plea is not guilty, which plea is now duly entered.

It Is Ordered that this case be and it is set for trial April 10, 1951, at 10:00 o'clock a.m.

In the United States District Court
For the District of Arizona

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF
THURSDAY, APRIL 12, 1951

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney, and E. R. Thurman, Esquire, Assistant United States Attorney, appear for the Government. The defendant is present in person with his counsel, George T. Wilson, Esquire, and George Sorenson, Esquire. Louis L. Billar is present as official reporter.

Both sides announce ready for trial.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case be excused until April 17, 1951, at 10:00 o'clock a.m.

Counsel for defendant moves to invoke the Rule. Said motion is granted and all witnesses present are sworn, instructed by the court and excluded from the court room.

Government's Case

The following Government's witnesses heretofore sworn are now called and examined:

George Young,

Tom Chauncey,

George Henry Booth.

And thereupon at twelve o'clock noon, It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., to which time the jury, being first duly admonished by the court, the defendant and counsel are excused.

Subsequently, at 2:00 o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued

George Henry Booth is now recalled and further examined on behalf of the Government.

Fred Nichols heretofore sworn is now called and examined on behalf of the Government.

Vincent E. Cook heretofore sworn is now called and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1-A—Platinum bracelet, containing 31 carats of diamond settings.

1-B—Ladies' platinum wrist watch, containing 35 diamonds.

1-C—Ladies' Hamilton wrist watch, containing 77 diamonds.

1-D—Platinum spray dress clip containing 120 diamonds.

1-E—Bracelet containing 5 jade stones and 5 red carnelian stones, and 82 diamonds.

(Above descriptions taken from labels attached to exhibits.)

And thereupon the Government rests.

Defendant's Case

Robert S. Hooper is now sworn and examined on behalf of defendant.

Raoul S. Cosenza is sworn and examined in his own behalf.

And thereupon at 4:15 o'clock p.m., It Is Ordered that the further trial of this case be continued until Friday, April 13, 1951, at 10:00 o'clock a.m., to which time the jury, being first duly admonished by the court, the defendant and counsel are excused.

In the United States District Court
For the District of Arizona

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF FRIDAY, APRIL 13, 1951

The jury, and all members thereof, the defendant **and all counsel are present** pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case Continued

Raoul A. Cosenza is recalled and further examined in his own behalf.

Dorothy Cosenza is now sworn and examined on behalf of defendant.

The following defendant's witnesses are sworn and examined:

Mark A. Cosenza,
Hazel Hyatt,
Woodrow S. Duke.

Counsel for defendant states defendant's other witnesses are not present and rests with reservation that said witnesses may be called later and it is so ordered.

Rebuttal

The following Government's witnesses are sworn and examined:

Charles M. Hemphill,
William F. Connor.

Harry Roberts, heretofore sworn, is called and examined on behalf of the Government.

Lona Lane, heretofore sworn, is called and examined on behalf of the Government.

Fred Nichols, heretofore sworn, is recalled and further examined on behalf of the Government.

And the Government rests.

And thereupon, at 11:45 o'clock a.m., It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., to which time the jury, being first duly admonished by the court, the defendant and counsel are excused.

Subsequently, at 2:00 o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued

The following defendant's witnesses are sworn and examined:

R. O. Barrett,
Harry L. Nace,
Edwin Beauchamp.

And the defendant rests.

Both sides rest.

Counsel for defendant now moves for judgment of acquittal as to count 1 of the Indictment on account of insufficient evidence; and moves for dismissal of count 2 on ground it fails to state an offense and moves for judgment of acquittal on said count 2 on account of insufficient evidence.

It Is Ordered that said motions be and they are denied.

All the evidence being in, the case is argued by respective counsel to the jury. Whereupon, the court duly instructs the jury and said jury retire at the hour of 4:00 o'clock p.m. in charge of sworn bailiff to consider of their verdict.

Subsequently, at 6:20 o'clock p.m., the defendant and all counsel being present, the jury return in a body into open court and all members thereof being present, are asked if they have agreed upon a ver-

dict. Whereupon, the Foreman reports that they have agreed and presents the following verdict:

* * *

[To avoid duplication, a copy of the verdict which is recorded on the original minutes is not set forth here, the same being an exact copy of the signed original thereof which follows.]

The verdict is read as recorded and no poll being desired by either side, the jury is discharged from the further consideration of this case and excused until further order.

It Is Ordered that this case be and it is set for sentence April 23, 1951, at 10:00 o'clock a.m., and that the defendant be committed to the custody of the United States Marshal and his bond exonerated.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Raoul A. Cosenza, Guilty as charged in count 1 of the Indictment, Guilty as charged in count 2 of the Indictment.

/s/ FLOYD HARLEY CLARK,
Foreman.

[Endorsed]: Filed April 13, 1951.

Subsequently, at 2:00 o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued

The following defendant's witnesses are sworn and examined:

R. O. Barrett,
Harry L. Nace,
Edwin Beauchamp.

And the defendant rests.

Both sides rest.

Counsel for defendant now moves for judgment of acquittal as to count 1 of the Indictment on account of insufficient evidence; and moves for dismissal of count 2 on ground it fails to state an offense and moves for judgment of acquittal on said count 2 on account of insufficient evidence.

It Is Ordered that said motions be and they are denied.

All the evidence being in, the case is argued by respective counsel to the jury. Whereupon, the court duly instructs the jury and said jury retire at the hour of 4:00 o'clock p.m. in charge of sworn bailiff to consider of their verdict.

Subsequently, at 6:20 o'clock p.m., the defendant and all counsel being present, the jury return in a body into open court and all members thereof being present, are asked if they have agreed upon a ver-

dict. Whereupon, the Foreman reports that they have agreed and presents the following verdict:

* * *

[To avoid duplication, a copy of the verdict which is recorded on the original minutes is not set forth here, the same being an exact copy of the signed original thereof which follows.]

The verdict is read as recorded and no poll being desired by either side, the jury is discharged from the further consideration of this case and excused until further order.

It Is Ordered that this case be and it is set for sentence April 23, 1951, at 10:00 o'clock a.m., and that the defendant be committed to the custody of the United States Marshal and his bond exonerated.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Raoul A. Cosenza, Guilty as charged in count 1 of the Indictment, Guilty as charged in count 2 of the Indictment.

/s/ FLOYD HARLEY CLARK,
Foreman.

[Endorsed]: Filed April 13, 1951.

In the United States District Court
For the District of Arizona

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF
MONDAY, APRIL 23, 1951

This case comes on regularly for sentence this day. The defendant is present in person with his counsel, George Sorenson, Esquire, and is advised by the Court of his right to make a statement in his own behalf and to present any information in mitigation of punishment. Thereupon, the Court finds that no legal cause appears why judgment should not now be imposed and renders judgment as follows:

[To avoid duplication, a copy of the Judgment and Commitment which is recorded here on the minutes is not set forth here, the same being an exact copy of the signed original thereof which follows.]

* * *

In the District Court of the United States
For the District of Arizona
No. C-9426 Phoenix

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RAOUL A. COSENZA,
Defendant.

JUDGMENT AND COMMITMENT

On this 23rd day of April, 1951, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 18, United States Code, Section 2315 (receiving stolen property in interstate commerce), as charged in count 1 of the Indictment, and Title 18, United States Code, Section 4 (Misprision of felony), as charged in count 2 of the Indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.

It Is Ordered that the Clerk deliver a certified

copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated at Phoenix, Arizona, this 23rd day of April, 1951.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed and Docketed April 23, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Raoul A. Cosenza, 4400 North 20th Street, Phoenix, Arizona.

Name and Address of Appellant's Attorney: Ira J. Bergman, Nicholson Building, 32 North Central, Phoenix, Arizona.

Offense: Violation 18 U.S.C.A. 2315 and 18 U.S.C.A. 4.

Date of Judgment and Sentence: April 23, 1951.

Brief Description of Judgment and Sentence: Found guilty as charged in both counts of the indictment and sentenced to Three (3) years imprisonment in a Penitentiary to be designated by the Attorney General.

Defendant now in the custody of the United States Marshal, confined in the Maricopa County jail, Phoenix, Arizona.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated this 27th day of April, 1951.

/s/ RAOUL A. COSENZA,
Appellant.

/s/ IRA J. BERGMAN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

ELECTION NOT TO COMMENCE
SERVING SENTENCE

Pursuant to Rule 38 (a) 2, Federal Rules of Criminal Procedure, notice is hereby given by the defendant-appellant, Raoul A. Cosenza, that he elects not to commence serving his sentence imposed by the Court in the above-entitled and numbered action pending his appeal to the United States Court of Appeals for the Ninth Circuit.

Dated at Phoenix, Arizona, this 15th day of May, 1951.

/s/ RAOUL A. COSENZA,
Defendant-Appellant.

/s/ IRA J. BERGMAN,
Attorney for Defendant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 15, 1951.

In the United States District Court
For the District of Arizona

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF
MONDAY, MAY 28, 1951

Motion of Defendant for New Trial on grounds of Newly Discovered Evidence and Motion of Defendant for Order Fixing Bail Pending Appeal come on regularly for hearing this date. E. R. Thurman, Esquire, Assistant United States Attorney, appears for the Government. Ira Bergman, Esquire, is present for the defendant.

Counsel for defendant now submits said motions and counsel for the Government files Government's Response to Motion for New Trial.

Counsel for defendant moves for 60-day extension of time to file Record on Appeal in Court of Appeals.

It Is Ordered that the record show said motions are submitted.

In the United States District Court
For the District of Arizona

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF
TUESDAY, MAY 29, 1951

It Is Ordered that the time to file the Record on
Appeal and docket the appeal herein in the United
States Court of Appeals for the Ninth Circuit be
extended to and including July 6, 1951.

In the United States District Court
For the District of Arizona

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

MINUTE ENTRY OF
FRIDAY, JUNE 1, 1951

It Is Ordered that Defendant's Motion for New
Trial on Grounds of Newly Discovered Evidence
be and it is denied, and

It Is Further Ordered that Defendant's Motion
for Order Fixing Bail Pending Appeal be and it is
denied.

United States Court of Appeals, Ninth Circuit
C-9426 Phx.

RAOUL A. COSENZA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER

This matter came to be heard upon the appellant's petition for bail pending appeal. Upon hearing the motion, which was not opposed by the United States Attorney, the Court required the appellant to supply it with a copy of the transcript of the testimony in the trial court as soon as the same should be available, and the motion was submitted to the Court to be considered upon the motion papers and upon the transcript when supplied. Thereafter a transcript of the testimony was lodged with the Court and has been examined in connection with the motion. After due consideration of the same,

It Is Ordered that the appellant be admitted to bail pending a consideration of his appeal to this Court, such bail to be fixed in the amount of \$10,000, the same to be presented to and approved by the United States Attorney and the Judge of the District Court.

HOMER T. BONE,

WM. E. ORR,

WALTER L. POPE,

United States Circuit Judges.

[Endorsed]: Filed U.S.C.A. June 22, 1951.

[Endorsed]: Filed U.S.D.C. June 25, 1951.

In the United States District Court
For the District of Arizona

No. C-9426 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAOUL A. COSENZA,

Defendant.

REPORTER'S TRANSCRIPT

The above-entitled and numbered cause came on duly and regularly to be heard in the above-entitled court, before the Honorable Dave W. Ling, Judge, presiding with a jury, commencing at the hour of 10 o'clock a.m. on the 12th day of April, 1951.

The plaintiff was represented by Frank E. Flynn, United States Attorney, and E. R. Thurman, Assistant to the United States Attorney.

The defendant was represented by Messrs. George T. Wilson and George Sorenson of Messrs. Minne and Sorenson, Attorneys at Law, Phoenix.

The following proceedings were had:

The Clerk: C-9426, Phoenix, United States of America, Plaintiff, versus Raoul A. Cosenza, Defendant, for trial.

Mr. Thurman: The Government is ready.

Mr. Wilson: The defendant is ready, your Honor.

The Court: Call the names of 28 jurors.

(Whereupon 28 prospective jurors were called and took their places in the jury box.)

The Court: The case upon which you will be asked to qualify this morning is a criminal action entitled "United States of America against Raoul A. Cosenza."

The indictment returned against the defendant is in two counts. The first count charges that on or about the first day of December, 1949, in the City of Phoenix, State and District of Arizona, the defendant did unlawfully and feloniously, at one time, receive from one George Henry Booth, and conceal certain stolen jewelry, which is described, of the approximate value of \$25,000.00, said jewelry having theretofore been stolen in Oklahoma City, State of Oklahoma, and transported in interstate commerce from the said Oklahoma City, Oklahoma, to Phoenix, Arizona, and that Cosenza then and there knew that said jewelry had been stolen.

Now the second count charges that on or about the first day of October, of the same year, [2*] 1949, in the State and District of Arizona, one George Henry Booth actually committed a crime in violation of Title 18 U.S.C.A., 2314, a felony cognizable by a court of the United States, in that the said Booth did, on or about the said first day of October, 1949, transport and cause to be transported in interstate commerce, at one time, this same jewelry from Oklahoma City, State of Oklahoma, to the City of Phoenix, and that the said defendant, Cosenza, having actual knowledge of the commission of said felony as above set forth, did, on or about the first

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said federal offense and did not, as soon thereafter as possible, in the State and District, make known the same to a judge or other person in civil or military authority under the United States of America.

(Thereupon 28 prospective jurors were called and sworn by the Clerk to answer well and truly questions touching upon their qualifications, and after being examined on their voir dire, a jury of 12 was duly empaneled and sworn to try the cause.

(Thereupon the following proceedings were had:) [3]

The Court: You may call your first witness.

Mr. Thurman: George Young.

Mr. Wilson: If the court please, at this time may we ask that the rule be invoked on all witnesses?

The Court: All right, both sides call your witnesses.

(Witnesses for both sides were thereupon called, duly sworn by the Clerk, admonished by the court and dismissed from the court room.)

GEORGE YOUNG

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Direct Examination

By Mr. Thurman:

Q. Will you please state your name?

A. George Young.

Q. You are a member of the Police Department of the City of Phoenix, Arizona?

A. I am, yes, sir.

Q. How long have you been such member of the Police Department in the City of Phoenix, Arizona, Mr. Young? A. 13 years. [4]

Q. Say, during the last four or five years, what has been your particular responsibilities in the City of Phoenix Police Department?

A. I am captain of the detectives, Police Department.

Q. What about the property that may be placed with the officers of the City of Phoenix?

A. I have charge of all of the property that comes into the police channels in Phoenix.

Q. You are known as the custodian, is that the proper word?

A. Well, yes, it is under my jurisdiction.

Q. And when property is delivered to you as such custodian, what do you do?

A. We file it and put it away for safe keeping.

Q. Who has charge of it; that, is the physical possession of it?

A. The physical possession is Charles Sittenfeld.

(Testimony of George Young.)

Q. Is it kept under lock and key?

A. Yes, sir.

Q. Were you subpoenaed here as a witness to bring certain exhibits this morning?

A. I was, yes, sir.

Q. Did you bring them? A. I have. [5]

Q. You have them with you, have you?

A. I have.

Q. May I look at them?

(Thereupon numerous articles were handed by the witness to Mr. Thurman.)

Q. (By Mr. Thurman): Who put these seals on the outside of this Government's Exhibit 1 for Identification? A. Who put the seals on?

Q. Yes. A. I don't know.

Mr. Thurman: Mark this.

(Thereupon the document was marked as Government's Exhibit 1 for Identification.)

Mr. Thurman: I hand you Government's 1 for Identification and ask you to examine it.

A. You wish me to open it?

Q. Well, you know the contents of the package, do you not? A. Yes, sir.

Q. All right. Now, is that package and the contents, can you tell the court and jury whether or not they were kept under your supervision and direction? A. They were.

Q. All right. Please open the package. [6]

(The witness complies.)

(Testimony of George Young.)

Q. (By Mr. Thurman): Now, where did you receive the contents of that package?

A. The contents of this package were turned over to me by my Detectives Roberts and Nichols.

Q. What are their full names?

A. Harry Roberts and Fred Nichols.

Q. They are in the court room now: that is, they were here as witnesses this morning and were sworn?

A. That is right.

Q. And after you got possession of it what did you do with it?

A. They have been kept in the vault with the exception of two occasions. They were taken out to the Bureau of Investigation who had them in their possession on both occasions.

Q. And did you accompany the exhibits at both times?

A. We turned them over to them, that is all.

Q. And were they taken before the Grand Jury, do you know?

A. They were.

Q. Who had them there?

A. I had them.

Q. And are they practically in the same [7] condition now at this time as they were at the time you received them from the officers whose names you mentioned?

A. They appear to be, yes, sir.

Q. Where did you receive them from the two officers you mentioned?

A. In the Detective Bureau, Phoenix.

Mr. Thurman: Please mark these purported

(Testimony of George Young.)

bracelets in Government's Exhibit 1 for Identification.

(Thereupon the articles were marked as Government's Exhibit 1-A and 1-B for Identification.)

Mr. Thurman: 1-C for Identification is a watch with band; 1-D for Identification is a spray; 1-E for Identification is a bracelet or necklace.

(Thereupon the articles were marked as Government's Exhibits 1-C, 1-D and 1-E for Identification.)

Q. (By Mr. Thurman): Then, Mr. Young, you are familiar with these exhibits?

A. I am, yes, sir.

Q. You had them in your care and custody for practically how long a time?

A. Oh, I have had them since May, 1950. [8]

Q. And these are the same ones you had before the Grand Jury?

A. They are, yes, sir.

Mr. Thurman: You may cross-examine.

Cross-Examination

By Mr. Wilson:

Q. Do I understand, Captain, that your first knowledge of these various exhibits that have been shown to you comes through their having been delivered to you by your subordinates, your detectives?

A. That is right.

Q. And they have not been in your custody continuously since that time?

(Testimony of George Young.)

A. They were taken out on two occasions. If I recall, it was in June of '50 and then they were——

Q. (Interrupting): In whose custody were they then?

A. The Federal Bureau of Investigation.

Q. And sometime later——

A. (Interrupting): They were taken out again in January in the same custody.

Q. And then upon each occasion they were delivered back, were they, to you personally? [9]

A. They were.

Q. You say you don't know who put the seals on that box that you identified?

A. No, sir; I don't.

Q. The one having actual physical custody of the particular exhibits in your department, however, is Charles Sittenfeld? A. That is right.

Q. He is actually the custodian of property of this nature? A. That is right.

Q. He is under your jurisdiction, in that he comes under the Detective Bureau, is that right?

A. That is right.

Mr. Wilson: That is all.

Mr. Thurman: That is all for this time. I may have to recall this witness later, your Honor.

(The witness was excused.)

Mr. Thurman: Mr. Tom Chauncey.

TOM CHAUNCEY

was called as a witness for the Government, and being first duly sworn testified as follows: [10]

Direct Examination

By Mr. Thurman:

Q. Mr. Chauncey, where do you live?

A. Adams Hotel.

Q. How long have you lived in Phoenix, Arizona? A. 25 years.

Q. 25 years? A. Yes, sir.

Q. And what is your business or profession, Mr. Chauncey?

A. I am in the jewelry business.

Q. How long have you been in that business in Phoenix, Arizona? A. In my own business?

Q. Well, in the jewelry business?

A. About 25 years—24 years.

Q. You say you have been in your own business, too? A. Yes, sir.

Q. How long have you been in that?

A. 11 years.

Q. Where is your store located, your place of business? A. 40 East Adams Street.

Q. And during these many years have you [11] had occasion as a dealer in jewelry to handle precious stones? A. Yes, sir.

Q. Jewelry of all kinds, have you?

A. Yes.

Q. You are experienced in the prices of such merchandise in this vicinity? A. Yes, sir.

(Testimony of Tom Chauncey.)

Q. Have you had occasion to examine the exhibits that I hold in my hand, being Government's Exhibits 1-A to E for Identification, have you ever seen these before? A. Yes, sir.

Q. And when was it that you saw them?

A. I don't know the dates that I saw them. I was called to examine them sometimes ago over at the City Hall in the Police Department.

Q. And did you make an examination at that time? A. Yes, sir; I did.

Q. And you are sure these are the same pieces of jewelry that you examined at that time in the City Hall? A. Yes, sir.

Q. And did you come to any valuation of the particular jewelry? [12]

A. Yes, we made a list, I believe, at the time on all of these pieces.

Q. Have you got that list?

A. No, sir; I don't.

Q. Do you identify the jewelry? A. Yes.

Q. Do you remember what price you fixed on them? A. No, sir; I don't.

Q. Do you want to refresh your memory from the—— A. (Interrupting): Yes, sir.

Q. I don't know where the slip is. Do you know who you turned the slip over to?

A. I believe Captain Young, or I believe it was some gentleman from the FBI.

Q. You would know if you saw it again, this slip? A. Yes, sir.

(Testimony of Tom Chauncey.)

The Court: In your opinion, were they worth more than \$5,000.00?

A. Yes, sir.

The Court: Would you gentlemen stipulate that the exhibits are worth more than \$5,000.00?

Mr. Wilson: Your Honor, I would not impede the progress of the trial, but I have never seen [13] the stuff myself, I haven't any idea what it is.

Mr. Thurman: I don't think you could qualify as an expert anyhow, can you, George? Could you examine them now and tell us the approximate value of these particular pieces of jewelry that you hold in your hand?

The Witness: Well, it would be in excess of \$5,000.00.

Mr. Thurman: You may cross-examine.

Mr. Wilson: No cross-examination.

The Court: We will have our morning recess at this time. During the recess do not discuss the case among yourselves nor permit anyone to discuss it with you, also avoid forming or expressing any opinion upon any subject connected with it. We will recess for five minutes.

(Thereupon a short recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Thurman: George Henry Booth.

GEORGE HENRY BOOTH

was called as a witness on behalf of the Government, and being first duly sworn testified as follows: [14]

Direct Examination

By Mr. Thurman:

Q. You are George Henry Booth, are you not?

A. Yes, sir; I am.

Q. And you have been in this court before?

A. Yes, sir.

Q. Now, are you acquainted with the defendant in this case, Raoul A. Cosenza, who sits there with his lawyers? A. Yes, sir; I am.

Q. How long have you known the defendant, Booth?

A. Well, I met him sometime around in '47 or '48; the first part of '48 or '47.

Q. Where?

A. Well, he was bartending at a bar used for a club out on Washington—East Washington beyond Tovrea's.

Q. In Maricopa County?

A. Yes, sir; in Maricopa County.

Q. And you continued your relationship from that time on up until practically a year ago?

A. Yes, sir; on and off.

Q. And with respect to the middle of '49, what was your association with the defendant, if [15] any? A. Up until '49?

Q. Yes, about that time, what was your association?

(Testimony of George Henry Booth.)

A. Well, the association with him was selling liquor licenses part of the time.

Q. And after that what took place?

A. Well, along about August, I believe it was, in '49, I saw him and had a meeting with him.

Q. Now, was this the first meeting you are going to tell us about now?

A. Well, yes, respect to this case.

Q. About when was that, did you say?

A. Around August or September.

Q. '49? A. Yes.

Q. And where, can you tell us, did that meeting take place?

A. Well, I don't remember. I met him at two or three places. One of them, of course, at the Jefferson Bar. I met him there a couple of times.

Q. Here in Phoenix, Arizona?

A. Yes, Phoenix, Arizona.

Q. Who was with you at that time besides yourself and Cosenza, if anyone?

A. Well, one time I believe Lona Lane was [16] with me once or twice. Of course, I was there by myself too.

Q. At this Jefferson Bar, what was Cosenza doing there at that time and place, if you know?

A. Well, he was getting ready to open this bar. I can't remember at the time whether he had it open or not at that time.

Q. Did you have any discussion with him at that time concerning the facts of this case?

A. Well, yes, I did.

(Testimony of George Henry Booth.)

Q. And where did that take place?

A. Well, I believe it was at this bar. I believe he was working at the bar, or something, getting ready to open it or something.

Q. About what time of the day was that?

A. Well, sir, I couldn't say what time of the day.

Q. What was the nature of this conversation?

Mr. Wilson: Well, we object until a more definite time is fixed. It is rather vague.

Q. (By Mr. Thurman): Can you fix it in more detail as to the time and place of this conversation?

A. Well, this one conversation was around that time, August or September, at this bar, I believe. It was about—let's see, well, I couldn't say what time of day it was, whether it [17] was in the evening or morning. I believe it was in the morning, though.

Q. In the morning?

A. I believe, yes, sir.

Q. About what month was it?

A. In August or September.

Q. In the latter part of August?

A. I'd say around that time.

Q. Do you know who was there besides yourself and Cosenza, if anyone?

A. Well, I can't remember, no, at that meeting. I believe him and I talked alone on that.

Q. What was the substance of that conversation?

A. Well, I told him I was planning on going to the east and see if I could pick up some jewelry,

(Testimony of George Henry Booth.)

I mean, burglarize some places and get some jewelry and I asked him if he thought he might be able to get rid of it. He said he could if I could get anything worthwhile.

Q. And when you said, "to get jewelry," what kind of jewelry did you have in mind?

A. Well, I had in mind diamonds and like that, diamonds, precious stones.

Q. Were you going to buy them?

A. No, sir. I told him and explained to him that I was going to burglarize, have to get [18] them in burglaries.

Q. And then what took place after that meeting between you and Cosenza?

A. Well, as I can remember, shortly after that, I may have seen him a time or two, but then after that I left for Oklahoma.

Q. Did you ever see the defendant out at 24th Street and Camelback Road?

A. Yes, I did.

Q. And at what place in that vicinity did you see him?

A. I believe he was bartending out there at this Corral—it used to be the Corral, or something like that, on 24th and Camelback Road.

Q. When was it did you see him out there?

A. I think it was in August or September. I believe he was getting ready to open that bar and that is when Lona Lane was with me.

Q. Did you discuss the facts of that matter with the defendant at that time and place?

A. I think I did, yes, sir—yes, everytime I saw

(Testimony of George Henry Booth.)

him I talked with him about it, something about it.

Q. When you talked to him, when Lona Lane was there, just what part of the premises did you hold this conversation with the defendant? [19]

A. At the bar.

Q. Was Lona Lane right there?

A. Well, she was, yes, sir, sitting there.

Q. She didn't enter into the discussion, did she?

A. Well, I don't remember whether she did or not.

Q. And at this particular time what was the substance of your conversation with the defendant with respect to this jewelry, if any?

Mr. Wilson: Could we have the date, your Honor, more definitely fixed?

The Court: Well, you could have if he could remember it, but he says it was along in August or September, that is his best recollection. That is all any witness can testify to. Go ahead.

(The question was read by the reporter.)

The Witness: Well, the same conversation, that I was planning on going on, I think, to the East and see if I could get some jewelry, if he could handle it, just like he always told me: "Anytime you get anything. I can help you get rid of it, I can help you merchandise it."

Q. (By Mr. Thurman): You didn't have any of that jewelry with you at that time?

A. No, sir; I didn't at that time. [20]

Q. When did you see the defendant again, if

(Testimony of George Henry Booth.)

you did, subsequent to the time that you—subsequent to the two times that you have mentioned?

A. Well, as I remember, that is the only place I saw him is there and down to the Jefferson Bar. I might have met him on the street a time or two. I can't remember.

Q. Did you ever leave for the East, as you say, after these conversations with the defendant?

A. I did, yes.

Q. And who did you go with?

A. Well, I and Oliver Wheeler.

Q. And who was Oliver Wheeler?

A. Well, he was, at that time he was with me, I mean, on these burglaries. He was committing these burglaries with me, in other words, a partner.

Q. Did he leave with you from Phoenix?

A. He did, yes.

Q. Where did you and Wheeler go?

A. Well, we left Phoenix and we went to, almost direct to Oklahoma City.

Q. Now, about what time did you leave Phoenix for Oklahoma City with this man Miller?

A. Sir, I couldn't remember that.

Q. Was it—can you give us the month? [21]

A. Well, I believe it was in September.

Q. September?

A. Yes, it was in September.

Q. How did you go from here to Oklahoma City, the two of you? A. Drove.

Q. In an automobile? A. Yes.

Q. And when did you get to Oklahoma City?

(Testimony of George Henry Booth.)

A. Well, it was along the latter part of September. I can't remember the date of that, the latter part of——

Q. (Interrupting): After you and this man, what did you say his name was?

A. Wheeler, Oliver Wheeler.

Q. I called him "Miller" a minute ago. After you and Wheeler got to Oklahoma City—that is in the State of Oklahoma? A. Yes.

Q. What did you do?

A. Well, there were, I think we stayed—well, I think the first night we went into Oklahoma City we went to the residential district, this Country Club residential district and looked these houses over and that night committed just one burglary, this Cosmer residence in Oklahoma [22] City.

Q. Who went in the house, you?

A. No sir; I didn't go in the house. That fellow went in the house and I waited in front, around the block and he brought out a small safe and then we loaded the safe, took the safe to the country and the next day we went back and broke the safe open and removed the jewelry.

Q. And when you left Phoenix with Wheeler, you didn't have the safe with the jewelry in it, did you? A. No, sir.

Q. When Wheeler left you to enter this home he didn't have any safe with him or any jewelry, did he? A. No.

Q. You know that of your own knowledge?

A. I am positive, yes, sir.

(Testimony of George Henry Booth.)

Q. Now, after the safe was obtained and broken open, as you have stated, what did you find in it?

A. Well, there were several pieces of jewelry, I figure about 25 or \$30,000.00 worth of jewelry.

Mr. Wilson: We object to that as giving an opinion and he is not qualified.

The Court: Well, maybe he is qualified. He [23] has been a burglar long enough.

Mr. Wilson: I don't know. This appears to have been his first experience, according to his testimony.

Mr. Thurman: As far as this case. I was just trying to limit it but we can get into the rest of it if he wants to, your Honor, we will be glad to.

The Court: All right, go ahead.

Q. (By Mr. Thurman): I am sure he won't be alone in it. I hand you Government's Exhibits 1-A to E for Identification and ask you to examine them.

A. Yes, sir.

Q. Now, have you ever seen that jewelry before?

A. Yes, sir.

Q. Where was the first time you saw it?

A. I saw these when I opened the safe out of the Cosmer residence in Oklahoma City.

Q. And was all of that jewelry found in that particular safe that you have mentioned?

A. It was, yes, sir.

Q. And are you familiar with jewelry and diamonds, stones?

A. Well, yes, sir; some.

Q. And have you had occasion to handle a good deal of it? [24]

A. Well, I have, yes, sir.

(Testimony of George Henry Booth.)

Q. And you had occasion to dispose of it, sell it?

A. I have, yes, sir.

Q. And during these several years have you had some idea of the price of jewelry that was stolen?

A. Yes, sir; I have a pretty close idea.

Q. And can you give the court and the jury your value of the exhibits I handed you?

Mr. Wilson: We object on the ground the witness is not qualified to testify as to the value.

The Court: Go ahead.

A. Yes, sir; I could. I could give you an approximate value.

Q. (By Mr. Thurman): What do you say it was worth?

A. I would say it would be roughly worth about \$25,000.00.

Q. That is the same testimony you gave before the Grand Jury, wasn't it?

A. I believe it was, yes, sir.

Mr. Wilson: We object to that, if the court please.

The Court: Yes.

Q. (By Mr. Thurman): Well, after you obtained this jewelry from the safe, what did you do with the [25] safe?

A. Well, I left the safe there and I just took the jewelry along.

Q. You say you took the jewelry along. Where did you take it to?

A. I took the jewelry with me and brought it back to Arizona.

(Testimony of George Henry Booth.)

Q. Now, when you speak of the jewelry, you mean this jewelry here, these exhibits I handed you, five pieces?

A. Yes, sir. Of coures, there was more jewelry, but that was among them.

Q. That was among them? A. Yes.

Q. Where were you going with this jewelry after you left Oklahoma and brought—after you left Oklahoma with it?

A. Well, I was coming back to see Cosenza about it, see if it could be—we could merchandise it.

Q. And then if nothing was done in Arizona what were you going to do about it?

A. Well, I figured that he had had a deal for me on it. In other words, I had it in mind of merchandising it to him.

Q. What took place after you got to Phoenix?

A. Well, I didn't show him the jewelry at the time I came back. I told him I did have it.

Q. Where was it that you told him you had it?

A. I believe it was at this bar, the Jefferson Bar.

Q. At the Jefferson Bar? A. Yes, sir.

Q. And about when was that? .

A. Well, around October, I believe we came back in October, maybe the middle or the last, something like that.

Q. Can you give the court and jury an idea as to the date of the burglary?

A. I believe it was along the last part of September.

(Testimony of George Henry Booth.)

Q. Then where did you go with the jewelry; did you come straight to Phoenix with it?

A. Well, I came to Texas and then to Phoenix, yes, sir.

Q. What time did you land in Phoenix with the jewelry?

A. Well, I couldn't say exactly what time.

Q. Can you give us an idea of the month?

A. It was around October sometime, along the last part of October is my best recollection. [27] I think that is about right, October.

Q. Just tell us what took place at that time with respect to this jewelry.

A. Well, I talked to him about the jewelry and told him I had it and he said he hadn't anyone lined up right at that time, and we talked about it a little and I said, "Well, I am planning on making another trip back," I was thinking about making another trip back. He said, "That is all right, that is all right, and get what you can get and I will have a market for it and sell the whole thing," so then I went back.

Q. Did you go back?

A. Yes, sir; I did, we went through Texas and Oklahoma and various parts of Texas, Oklahoma, Tulsa and different cities.

Q. Did you ever return to Phoenix?

A. Yes, I did.

Q. About when?

A. Around about the last of November.

Q. Of what year? A. '49.

(Testimony of George Henry Booth.)

Q. And did you see Cosenza when you got back in '49? A. I did, yes, sir.

Q. When? [28]

A. I saw him at this bar, the Jefferson Bar at that time.

Q. And what took place between you and Cosenza at that time?

A. Well, I told him I had this jewelry and, altogether that I did have, if I remember right, approximately 50 or \$60,000.00 worth of jewelry altogether.

Q. What did he say in response to this?

A. Well, he said he had been doing some looking around, he had a couple of men in mind to show it to.

Q. Then what took place?

A. Well, he wanted to take it and sell it piece by piece, I guess, first, and I——

Mr. Wilson: (Interrupting) May we have the conversation, please, instead of a conclusion of the witness.

Q. (By Mr. Thurman): What did he say, in substance?

A. Well, as I remember, he said, well, he says, "I have some men in mind, some parties in mind, and if you want to sell it," he says, "we could make a deal on it," and he said he wanted to know what his commission would be. I told him "Well, you know me? It would be right," and we did have some conversation about what the [29] percentage it would be, but I don't remember what

(Testimony of George Henry Booth.)

that was, and so then he said he had arrangements made to show this to a fellow by the name of Skipper, I mean, Skipper's Bar, I believe it was, and he wanted to know when I could get the jewelry. I told him I had it in a certain place and if he would meet him, I would meet him at this place, I mean, I would get the jewelry and meet him at this place and he could look it over and take what pieces he wanted to show as a sample, so he met me at this West Madison Street address, him and this Lona Lane, and he looked over all I had there and said he would pick out these pieces, these particular pieces that he thought he would like to show them.

Q. (By Mr. Thurman): Were they packed in anything at that time?

A. Well, at that time, I can't remember. They were in a sack, I believe. I believe they were in a paper sack, all of it.

Q. After you showed him these pieces at this address, did you say?

A. Well, I believe it was on West Madison, the 1500 block, I believe it was.

Q. Here in Phoenix, Arizona? A. Yes.

Q. Then what took place?

A. Well, I showed him—of course, he picked out these few pieces he wanted to show as samples, to show the man that they were all right, and I told him, I said, "Well, you know, I don't want anything to do with this stuff." He said, "That is all right, I will carry it," and I left my car there and

(Testimony of George Henry Booth.)

he selected these pieces and put them in his pocket and we came downtown and we rode down in a white Buick.

Q. Who had the white Buick?

A. Mr. Cosenza, and we rode downtown in that Buick and he put them in his pocket. He parked in a parking lot and he took it into Skipper's place.

Q. And do you remember what day that was?

A. Well, sir, I don't remember exactly. I think it was along—I can only give you approximately, around the first of December.

Q. Of what year? A. Of '49.

Q. Now, about what time of day was it that you went into this—that you or Cosenza went into Skipper's Bar here in Pheniox, Arizona?

A. Well, sir, it was—that, I could think pretty close. It was around one o'clock. [31]

Q. Now, tell the court and jury, if you can, where this Skipper's Bar is located that you mentioned.

A. Well, I don't know, I don't remember. It is, I believe, on Monroe or Adams right off Central, Skipper's Bar and Buffet, west.

Q. Who went in first, into Skipper's?

A. Well, we walked in together like and I waited in the front.

Q. Whereabouts in the front did you wait?

A. Well, sir, I waited in the front end of the bar or the tables, I can't remember, but I sat there and waited for him. He went in to see Skipper.

Q. Just where did Cosenza go?

(Testimony of George Henry Booth.)

A. Well, he went into a private office in the back, into Skipper's office while I waited in the front.

Q. Did you see anybody in the front bar?

A. Well, yes, there was. There was a bartender there, I believe one or two bartenders, that, I can't remember. There was one, I know, was in there, and probably two or three people.

Q. Did you see that bartender here this morning in the court room?

A. No, sir; I didn't pay any attention, I [32] didn't notice.

Q. After Cosenza went into this office, as you claim, Skipper's office, what took place?

A. Well, I waited approximately 15 minutes, maybe 20 minutes, something like that, and he came to the door and called me.

Q. Who did?

A. Cosenza did, and I went into the office, as I remember, and they had this jewelry on the table, on his desk.

Q. This jewelry here that is marked as Government's Exhibit 1 for Identification?

A. Yes, sir.

Q. One to——

A. Yes, sir. That was on the desk and so I asked him, I said, "Those fellows all right?" He said, "Yes. This is Skipper, he is all right," and he said he was interested in—Skipper started talking about the jewelry. He said he really wasn't in the jewelry business. He said he might be interested in a couple of pieces of it and wanted to know if it was local,

(Testimony of George Henry Booth.)

if it was hot, and I told him, no, it was from the East, that it was not from here, that he could feel sure it was all right, so they took a couple of pieces out for appraisal. [33]

Q. Who went out with the pieces?

A. Well, Skipper walked out with the pieces and Cosenza and I stayed in the office.

Q. And did this man Skipper come back in?

A. Who?

Q. Who did you say? A. Skipper.

Q. Do you know Skipper's right name?

A. No, sir; I don't.

Q. The man known as Skipper, then?

A. The man that owns Skipper's. I only know him as "Skipper," that is all.

Q. How long was he gone, if you remember?

A. Well, I suppose probably another 15 minutes—20 minutes, something like that.

Q. Did he ever return? A. Yes, he did.

Q. What took place after this man Skipper returned to this room where this jewelry was?

A. Well, I don't know. He talked something about the price some fellow had appraised it to him for, and he said he didn't know if he would be interested in it or not. Then he said he wanted, I believe at that time he was interested in a bracelet or a watch for his wife or daughter that was graduating, that is all he was interested [34] in. I told him I understood when I came there he was not interested in a piece or two, he was interested

(Testimony of George Henry Booth.)

in taking it all, that I was not interested in selling a piece or two, and he said, "Well, this fellow, the bartender in the front," he said, "He may be interested in one of these pieces," and I said, "Well, I don't want to fool with anybody unless I know he is all right, because this merchandise is hot, plenty hot." "Well," he said, "this fellow is all right, he worked for me for a couple of years," and he okayed him and Cosenza okayed him and said he was all right. I said, "Okay, if he is all right I might be able to talk to him," and so this fellow came in the office and he made about some sort of an offer for the pieces I had.

Q. Do you know whether or not he made a definite offer, or whether he just discussed it generally and left?

A. Well, I think he just discussed it generally and tentatively made an offer, I think, something like \$600.00 for the pieces, or something of the kind.

Q. How long did he stay in there?

A. Oh, possibly five minutes, a short time.

Q. Did you eventually leave then or not? [35]

A. Well, after I understood he wanted to fool around with it, buy a piece or two at a time, this fellow Skipper, I didn't like the idea very well anyway and I told Cosenza that I'd rather—better see if we could make a better deal, because I wasn't interested in that kind of set-up.

Q. Cosenza was there all of this time?

A. Yes, he was right there.

Q. Then what took place?

(Testimony of George Henry Booth.)

A. Then I told him. He said, "What do you want to do?" I said, "I had better go back to my car, take this back, and see what you can do." He said, "All right, I will see what I can do," and he tried to get me to give him a piece or two at a time, he wanted to sell a piece or two separately. I told him I would rather wait to get a deal.

Q. After you made up your mind to leave, as you stated, who left first, if you know?

A. Well, sir, I don't remember. I think that Cosenza and I walked out of the place there together, or him a little in front of me, or something of the kind with the jewelry. He had—still had the jewelry in his possession in his pocket. [36]

Q. Now, when this man Skipper left the place, as you stated, to have an appraisal of the jewelry, do you know where he went, of your own knowledge?

A. No, sir; I do not.

Q. You didn't see him after he left the door?

A. No, sir; I didn't.

Q. Now, when you left with Cosenza, did you see this bartender still at the bar as you went out, or did you notice him back of the bar?

A. Yes.

Q. The same man that had been in the room previously?

A. Yes, the same man.

Q. And he was the same bartender that was on duty when you went in, is that correct?

A. Yes, sir.

Q. Now, what happened after that with respect to the jewelry?

(Testimony of George Henry Booth.)

A. Well, of course, he wanted it in pieces and I refused to do that.

Mr. Wilson: Wait a minute, if the court please, that is not responsive to the question.

Mr. Thurman: That is right.

Mr. Wilson: I move that it be stricken.

Q. (By Mr. Thurman): What happened to the jewelry [37] after you and Cosenza left Skipper's?

A. Well, I took the —we went out to his Buick which was in the parking lot and then he took me back to my car.

Q. And where was your car?

A. My car was in the vicinity there of 17th and——

Q. (Interrupting): And who had the jewelry during the ride from Skipper's to where your car was? A. He had it in his pocket.

Q. Did you get the jewelry back from him at that time?

A. Yes, I did when he left me out at my car.

Q. Then what did you do with the jewelry?

A. Well, I took the jewelry, this jewelry and put it back with the other jewelry and put—hid it back.

Q. Then where did you go with it?

A. Well, I kept it there for some time, of course, while he was trying to make another deal——

Mr. Wilson (Interrupting): We object to that, if the court please, that is a conclusion of the witness and move that it be stricken and that the jury be instructed to disregard it.

(Testimony of George Henry Booth.)

The Court: All right. [38]

Q. (By Mr. Thurman): What can you tell the court and jury about this other deal you mentioned that Cosenza was trying to make for you? Did you have any conversation about that? If so, give us the time and the place.

A. Well, shortly after this first visit that I had he took me out—I think it was after that visit, he took me out to South Central and mentioned some fellow's name that he was talking to him about the jewelry.

Q. And what took place with respect to the jewelry there?

A. Well, I didn't have the jewelry there. We were only talking. Of course, he took me out to talk to the fellow and the fellow wasn't interested and he mentioned he had some more in mind. That is about all it amounted to. I wouldn't let him have it any more. He wanted it and to take it to be used as a sample and I wouldn't let him do that.

Q. What did you do with the jewelry?

A. Well, I believe after that I took the jewelry when I moved it from here. I moved it to California.

Q. Moved it to California? A. Yes, sir.

Q. These pieces here? A. Yes, sir.

Q. Contained in this Government's Exhibit 1-A to E? A. Yes, sir.

Q. And what part of California did you take it to? A. Took it to Los Angeles.

Q. How long did you stay in Los Angeles?

(Testimony of George Henry Booth.)

A. Well, I don't remember in Los Angeles, but until around May, I believe.

Q. May of '50? A. Yes, sir.

Q. And then what took—where did you go?

A. Then I took it to Reno.

Q. Reno, Nevada? A. Yes, sir.

Q. What did you do with it in Reno, Nevada?

A. Well, that is where they apprehended me there in Reno. I was trying to sell them in Reno there when they apprehended me.

Q. Did you have them on your person when you went in Reno? A. No, sir; I did not.

Q. Where were they?

A. Well, a part of them was with a club [40] owner there and the other half of them was buried about 12 miles out of town, had them buried on the highway.

Q. Who buried them? A. I did.

Q. Were any of these pieces in this Government's Exhibit buried at that time and place by you? A. Yes, they were.

Q. All of them?

A. Well, everything except the watch.

Q. Which watch?

A. The watch right there.

Q. The little one?

A. That one, yes, sir.

Q. And that would be Government's Exhibit 1-B for Identification?

A. Yes, sir. This watch was with the club owner, I believe, at the time, this along with some more.

(Testimony of George Henry Booth.)

Q. This particular set accompanied the other pieces of jewelry from Oklahoma City through Texas, Arizona, California and Nevada, is that right? A. That is right, yes, sir.

Q. Now, who dug this jewelry up there in Nevada, if it was ever dug up? [41]

A. I did myself.

Q. How was it you came to dig it up?

A. Well, sir, after I was, of course, arrested, I came here and I wanted to clear my case up and so I decided to make all the restitution I could by turning this jewelry in and decided to make all the restitution I could and I turned it all up, dug it up.

Q. Did you go there alone and dig it up?

A. No, sir; I was with the officers that picked me up and arrested me.

Q. What officers took you there?

A. Officers Nichols and Roberts.

Q. Police officers?

A. Phoenix Police Department, yes.

Q. Did you take them out to where the place was?

A. Yes, sir, along with an FBI agent and I think the local sheriff there and a couple of other men.

Q. And after this particular jewelry was recovered, who took possession of it there, if you know?

A. Well, I believe the Officers Roberts and Nichols.

Q. Did you identify any of it at that time? [42]

(Testimony of George Henry Booth.)

A. Well, of course, I told them what I had buried there, and they, of course——

Mr. Wilson: (Interrupting): We object to this, if the court pleases. It would be, it seems to me, in the nature of hearsay evidence. It is out of the presence of this defendant. We object on the ground it is not competent evidence.

The Court: All right.

Mr. Thurman: And then after these officers received the jewelry what took place?

A. Well, they brought me—brought the jewelry back here to Phoenix, back to Phoenix, and me along with the jewelry, of course.

Q. Now, after you were brought to Phoenix by these two officers you have mentioned, what took place with respect to the jewelry and you?

A. Well, at that time I, of course, had some more in California which they recovered.

Mr. Wilson: We object to that, if the court please, not responsive to the question.

Mr. Thurman: Yes. To make it short, did you plead guilty to the transportation of the stolen jewelry in interstate commerce from the State of Oklahoma into the State of Arizona?

A. I did, yes, sir.

Mr. Wilson: I think the records of this [43] court here would be the best evidence as to whether he pleaded guilty.

Q. (By Mr. Thurman): Where are you now?

A. Well, I am in a Federal Penitentiary now.

Q. Which one? A. Latuna.

(Testimony of George Henry Booth.)

Q. You were brought here by subpoena to testify?
A. Yes, sir.

Mr. Thurman: You may cross-examine.

Cross-Examination

By Mr. Wilson:

Q. How old a man are you, Mr. Booth?

A. 36 years old.

Q. During the years '47 and '48, I believe you testified that you engaged in the business of buying and selling liquor license, is that right?

A. I believe in that time some, yes, the first part of '48 and '47.

Q. And on one occasion you became associated with the defendant, Mr. Cosenza, in the disposition of a liquor license, isn't that true?

A. Yes, sir; I was.

Q. You had a buyer for a liquor license, did you not, and Mr. Cosenza had one for sale, isn't [44] that true?
A. No, sir.

Q. That is not true?

A. No, sir; we were together.

Q. At that time did you know this man that you identified as Skipper?

A. Yes, I had met him once.

Q. So that when you went into Skipper's place on December 1st, 1949, you needed no introduction to this man Skipper at all, did you?

A. I have been around Phoenix a lot of years. I know him but he didn't know me at that time. He didn't remember me, no.

(Testimony of George Henry Booth.)

Q. Well, in '48, then you did meet Cosenza first at a bar, the VFW, is that right?

A. I believe it was a bar on East Washington, yes.

Q. Was that a VFW club room?

A. I believe it was some sort of a club he had a license there.

Q. Are you a veteran?

A. No, sir; I am not.

Q. You were not a member of the VFW?

A. No, sir.

Q. You were taken there by some friend, is that right? [45]

A. No, some friend and I went there to see him.

Q. You closed your business with Mr. Cosenza in the sale or disposition of the liquor license, didn't you, back in '48?

A. We did make a deal, yes. Him and I, we both bought it and both sold it.

Q. Did you have any other similiar transaction with the defendant after that time respecting any other license?

A. We, of course, had several prospects and several buyers, but after that time I don't believe we sold any more licenses, that is, as far as I know about it, we didn't.

Q. What was your business then after the sale of this license?

A. Well, you mean after I quit selling licenses with Cosenza?

Q. No, around in '48.

(Testimony of George Henry Booth.)

A. At that time I was doing nothing.

Q. And I believe you testified you may have seen Mr. Cosenza after the sale of this license on one or two occasions up to '49?

A. Yes. I don't remember—let's see—yes, I did.

Q. And there was no intimate friendship [46] between you and the defendant, was there, Mr. Booth? It was a casual acquaintance that grew out of that business transaction and that is all, isn't that true?

A. Well, I wouldn't say that, no, sir.

Q. Well, according to your direct examination, then, your next definite contact that you can recall with Mr. Cosenza, the defendant, was sometime probably during the month of August, 1949, is that right?

A. No, sir.

Q. Well, what did you testify to about August, '49, on your direct examination here this morning?

A. Well, that I had a discussion with him about going to Oklahoma.

Q. Had you had any previous discussions with Mr. Cosenza about going to Oklahoma before that month?

A. Well, I don't remember whether I did or not.

Q. All right, and that conversation, you were of the opinion on your direct examination, took place possibly at the Jefferson Bar and possibly at the El Rancho?

A. Yes, sir; one of the two places, I believe.

(Testimony of George Henry Booth.)

Q. But you are rather vague as to which [47] one of the bars it actually occurred at, is that right?

A. Well, sir, I believe I am a little bit. I can't remember which bar it was. Definitely, we had a conversation.

Q. Did you open the conversation by making this proposal of going out and rob people or burglarizing houses, or did Mr. Cosenza make the proposition at that conversation in August?

A. Mr. Cosenza and I had talked about burglary and things like that before. In fact, we participated together in a little burglary.

Q. And you testified, did you not, in the preliminary hearing in this matter down before the United States Commissioner?

A. This matter?

Q. Yes, against Mr. Cosenza, didn't you?

A. I believe I did, yes.

Q. Did you ever make any statement like you just made from the witness stand now that he ever engaged in a burglary with you?

Mr. Thurman: I object to that as being irrelevant and immaterial and an improper manner of impeachment.

The Court: Yes.

Q. (By Mr. Wilson): What is your best recollection [48] both as to the date in August and as to the place where this conversation took place?

A. Well, I can't remember which place it was, sir.

(Testimony of George Henry Booth.)

Q. I see. Are you certain that you had such a conversation with Mr. Cosenza?

A. I am positive.

Q. Mr. Booth, do you remember contacting Mr. Cosenza during the month of July, '48 or '9—I beg your pardon, '49?

A. I believe I did around that date.

Q. You contacted him out at the El Rancho bar, did you not, during the month of July, '49?

A. I think so.

Q. And you had Mr. Cosenza cash a check for you at that time, didn't you, Mr. Booth?

A. Oh——

Q. (Interrupting): Now, could you answer that yes or not? Didn't he cash a check for you?

A. Yes, but he suggested me writing it and cashing it.

Q. And the check later bounced, to use the slang expression, didn't it?

A. He knew it was going to bounce.

Q. Answer the question, you know it bounced, didn't you? [49]

A. The check was never even put through, I don't think. I don't think. I don't know what he done with the check, but he knew it was no good when I gave it to him and he told me to put another name on it so he could run it through the bar.

Q. Is it a fact, Mr. Booth, that Mr. Cosenza never saw you after you passed that check on him until about the first of December down here at Skipper's in '49?

(Testimony of George Henry Booth.)

A. I did see him between that time, yes.

Q. But now you can't place where you saw him, whether at that bar or down at the Jefferson Bar after you passed that hot check on him?

A. I didn't pass a hot check on him.

Q. Well, after you passed that check?

A. After he gave me the money for the check after stating that I write the check and sign another name to it so he could run it through the bar.

Q. You can't recall whether you saw him after that time at the Jefferson Bar or back at the El Rancho, can you?

A. No, sir; I can't. I can't remember exactly which place.

Q. It wasn't at the time that you passed [50] that check that you told him of your intended burglaries in Oklahoma, was it?

A. I don't understand the question.

Q. It was not at the time you passed the check that you had this conversation with him about going to Oklahoma and committing burglaries?

A. It was not at that time, no, during the time of the check in July.

Q. I believe you testified that you went away with some gentleman and later came back to Phoenix from Oklahoma sometime during the month of October, is that right?

A. I came back around in October sometime, I believe the last of October.

Q. Can you fix the date more definitely, Mr. Booth, than just the latter part of October?

(Testimony of George Henry Booth.)

A. That is the best I can do.

Q. Could it have been the early part of October?

A. That is the best I can do.

Q. Could it have been in November?

A. I only fixed it for you the best I could, the latter part of October.

Q. That is the best of your recollection?

A. That is right.

Q. And you contacted Mr. Cosenza, if I [51] remember your direct testimony here this morning correctly, you contacted him at the Jefferson Bar and told him of your robberies, is that right?

A. I believe at the Jefferson Bar or the Corral, one. I don't remember which.

Q. Is the Corral and the El Rancho one and the same?

A. I believe the same on 24th and Camelback Road.

Q. I see. It was one of these two places that you contacted Mr. Cosenza, the defendant, in the latter part of October, 1949, after committing a series of burglaries in Oklahoma, is that right?

A. I believe it was.

Q. Could it have been in any other place, Mr. Booth, other than the two places you named that you contacted Mr. Cosenza?

A. I saw him at two or three different places, but one of these two places where we had the conversation.

Q. And there you told him definitely, did you, that you had committed a burglary at either one or the other of these bars?

(Testimony of George Henry Booth.)

A. I told him at that time in October that I had committed these burglaries. [52]

Q. But it was at either one of these bars, is that right? A. I believe it was, sir.

Q. Then, according to your direct examination I believe you testified you left the City of Phoenix again and didn't return until sometime around the first of December, is that right, '49?

A. I believe around the last of November or the first of December, or the last of November and the first of December.

Q. And when you arrived in town in the latter part of November, '49, where did you contact Mr. Cosenza?

A. Well, I believe that was at the Jefferson Bar.

Q. Could it have been at the El Rancho or the Corral?

A. I don't believe it was at that time. I think he had quit working there, or something.

Q. You aren't able to fix any more accurate date than just the latter part of November, is that right?

A. Latter part of November is the best I can do.

Q. Was anybody with you when you contacted him at that time? [53]

A. Well, I was in the bar two or three times. Lona Lane was along with me.

Q. Then in the latter part of November, 1949, Lona Lane was with you a time or two?

A. I believe she was.

Q. Did Lona Lane know of your burglaries in Oklahoma?

(Testimony of George Henry Booth.)

A. She was aware of it, I think, yes.

Q. Did you display these jewels to her?

A. I believe I did show them to her, yes. She knew what they were.

Q. Did you ever take any automobile trip with Mr. Cosenza about that time other than the one when you went to Skipper's, I mean?

A. Well, I met him two or three times at different places. I can't remember. Yes, we did, we went up on North Central at one time.

Q. In your car or his car?

A. I can't remember. I think I met him out there in my car. I met him out there, he was in his car. He came from home, or something.

Q. Was this before the trip to Skipper's.

A. Well, that, I can't remember. I believe it was right after the trip to Skipper's.

Q. Well, before the trip to Skipper's did you take any trip with Mr. Cosenza? [54]

A. Well, that is a few days in there I just can't remember because I was seeing the man every day or two.

Q. I believe you testified on direct examination that in your first contacts with Mr. Cosenza you didn't tell him about these robberies, is that true?

A. I don't understand that. Which first contact?

Q. The one in October, did you tell him you had committed the burglaries?

A. I did positively, yes, sir.

Q. Did you explain to him the fruits of these burglaries?

A. I did at that time. I did tell him.

(Testimony of George Henry Booth.)

Q. Did you explain any jewelry to him in the conversations in the latter part of November, 1949?

A. The first time he saw the jewelry is when he went to get the jewelry with me to show it to Skipper. It was around the first of December.

Q. Mr. Booth, can you fix that date any more accurately than about the first of December?

A. No, sir; I can't, around the first of December.

Q. Is it your best recollection at that time [55] that it was on the first of December that you and Mr. Cosenza made a visit to Skipper?

The Court: He said about the first of December, not the first of December.

The Witness: I said about.

Mr. Wilson: I beg your pardon.

The Court: He said about the first of December, not the first.

Q. (By Mr. Wilson): Could it have been the latter part of November, would you say?

A. The only answer I have for that is about the first of December, and that is all. I can't say one—

Q. Could it have been the first of January?

A. The only thing I just have to say it was around the first of December. I don't remember any more—I mean, more or less, it was right in that time.

Q. Was your partner in crime, Mr. Wheeler, around at that time?

A. Yes, he was around at that time, yes.

Q. Was he in that party that visited Skipper's

(Testimony of George Henry Booth.)

on about the first of December?

A. No, sir; he was not.

Q. You say at that time that Mr. Cosenza came out to the house in the 1500 block on West [56] Madison Street, is that right? A. He did, yes.

Q. And you place the time now at about one o'clock, is that right? A. Yes, sir.

Q. Could it have been 1:15?

A. I'd say it was around close to one o'clock.

Q. And who else was present when Mr. Cosenza was at that house on that occasion?

A. Well, Lona Lane was—she come for dinner and I was there and I told her I was going to meet this fellow, and she didn't like it—

Q. (Interrupting): Just a minute. The question is, who was there when Mr. Cosenza was there?

A. I don't remember whether she had left when he was there. It was right about the time she left and he came up. Her little girl was there.

Q. What kind of a car was he in?

A. He was in a Buick, a white Buick.

Q. Is that the first time that Mr. Cosenza ever saw any of the jewelry which was the fruit of these burglaries that you and Mr. Wheeler had committed?

A. That is the first time he saw them. He knew about them, but that is the first time he saw [57] them.

Q. And in what kind of container did you have them at that time?

A. I believe in a paper sack.

(Testimony of George Henry Booth.)

Q. Did you have all the jewelry that you had pilfered from people at that in your possession?

A. Not all of it, no, sir.

Q. Did you have all of this jewelry that is here in court that you had looked at?

A. Yes, sir; I did.

Q. There and you displayed it to Mr. Cosenza?

A. I did at that time, yes, sir.

Q. When did you make an arrangement with Mr. Cosenza to meet him at that house, at that particular time?

A. Well, I believe it was the day before that, the day before or a couple of days, or something like that, two or three days. I called him. He said he had these men that wanted to see it and they would probably buy it. I believe it was that day or something I called him and made arrangements.

Q. Had you displayed these jewels to any other prospective purchasers here in the City of Phoenix prior to that time?

Mr. Thurman: I don't see the materiality [58] of it unless Cosenza was there and had a part of it, and for that reason I object to it.

The Court: You may answer.

The Witness: Well, yes, I did, I believe.

Q. (By Mr. Wilson): Did Mr. Cosenza have anything to do with getting those prospective purchasers? A. Well, no, I suppose he didn't.

Q. How long was Mr. Cosenza at the house in the 1500 block on West Madison before you departed to go to Skipper's?

(Testimony of George Henry Booth.)

A. Possibly 10 minutes—15 minutes, something like that, a few minutes until he selected out this jewelry.

Q. And you drove downtown in Mr. Cosenza's car?
A. Yes.

Q. Just the two of you?

A. The two of us, yes.

Q. And it is your testimony that the two of you went in together into Skipper's Bar, is that right?

A. Yes, sir.

Q. And you waited at the bar or in a booth there and Cosenza went to the rear?

A. That is right.

Q. This office in Skipper's Bar is in the [59] rear, is it?
A. Yes, it is.

Q. And is in such a position that you can't see the entrance to the bar from the street; I mean, the street entrance, is that right?

A. Well, I have never surveyed it. At least, I don't know.

Q. What is your best recollection? You were there, weren't you?

A. I don't believe—no, it wasn't. You can't see it from the street. You went into the door into the **store room** and his office is behind it from the store room, I believe, or a hallway in the back of the bar there, if I remember right.

The Court: We will suspend at this point until 2 o'clock. Keep in mind the court's admonition and be back at two o'clock.

(Thereupon a recess was taken at 12 o'clock noon.)

Two o'clock p.m., after recess, all parties as heretofore noted being present, the trial resumed as follows:

The Court: You may proceed. [60]

GEORGE HENRY BOOTH

resumed the witness stand and testified further as follows:

Cross-Examination
(Resumed)

By Mr. Wilson:

Q. Mr. Booth, I want to interrupt the questioning that I was on at the noon recess and ask you at this time, did I understand correctly that when you went to Oklahoma and burglarized a home or two, you returned to the City of Phoenix sometime in the latter part of October, is that right, '49?

A. I believe it was.

Q. Then you left again and returned about the first of December, or in that neighborhood, or the latter part of November, is that right?

A. Latter part of November, yes.

Q. You are sure you returned in October, are you?

A. Yes, I believe it was in October.

Q. And it was then that you told the defendant that you had burglarized places, but you didn't show him any of the loot, is that right, in October?

A. That is right.

Q. Do you remember that you were a witness against [61] this same defendant before the United States Commissioner in this building on the 27th day of June, 1950?

A. I believe I was, yes.

(Testimony of George Henry Booth.)

Q. In a case entitled "United States of America versus Raoul A. Cosenza, Defendant." Let me ask you if you weren't asked these questions and if you didn't testify as I shall now read:

"Q. Then in August following that, as I understand, you and Wheeler went to Oklahoma City? A. Yes.

"Q. And there you committed a series of burglaries?

"A. We committed one burglary first. This was the first job and then we committed two or three afterwards.

"Q. That was in the State of Oklahoma?

"A. Some in the State of Oklahoma and some in Texas as we came back.

"Q. Then you returned to the State of Arizona? A. Yes, right.

"Q. What month did you return to the State of Arizona?

"A. I believe it was around the first of December." [62]

You didn't testify there, did you, that you came back here in the month of October, did you, Mr. Booth?

A. Well, I don't remember exactly. I know I was in and out.

Q. Were you asked those questions and did you testify as you heard me read?

A. Of course, I can't exactly remember my testimony, but that sounds like my testimony.

Q. Well, as I understand, you and the defend-

(Testimony of George Henry Booth.)

ant, Mr. Cosenza, according to your testimony, went into the office of Mr. Skipper—Mr. Hooper, the proprietor of Skipper's Buffet, and there displayed this jewelry to him, is that right?

A. Well, sir, he displayed the jewelry to him before I went in.

Q. And was it the same jewelry that was displayed to you here in the court room this morning?

A. Yes, sir.

Q. Were there any other jewelry?

A. Well, there was one other piece, I believe.

Q. And was all of this jewelry displayed there to Skipper that is now in the court room?

A. As I can remember, it was. [63]

Q. Do I understand, or did I misunderstand you to say that you told Mr. Cosenza and Skipper at that time that this was what we commonly term "hot stuff"? In other words, that it was the result of your violation of the law?

A. I told him that, yes.

Q. You did? Did you tell him where you had gotten it?

A. I told Mr. Cosenza.

Q. I am talking about the conversation there at Skipper's?

A. I told him it was from the East, that it definitely was not from Phoenix. He asked me if it came from local. I told him, no, it was definitely out of the state.

Q. Did you make any reference of having a contact in San Francisco, California?

A. Well, I don't remember. I don't have any

(Testimony of George Henry Booth.)

contact there. I might have, but I don't remember it.

Q. Did you make any such statement as that to Mr. Cosenza there at Skipper's?

A. Having a contact?

Q. Yes. A. Not that I remember.

Q. I see. Skipper stepped out, you say, [64] while the jewelry was being displayed to him and took a piece with him, do I understand that correctly?

A. I believe he took two pieces, as I remember.

Q. And came back after a few minutes' absence, is that right? A. That is right.

Q. And when he came back he told you that he was not interested, or words to that effect, is that right?

A. Words to that effect. Himself, he was not interested.

Q. Did you have a conversation with Cosenza while Skipper was out of the room?

A. Well, we talked there, yes. I believe we talked while he was out of the room some.

Q. Mr. Booth, isn't it a fact that Mr. Cosenza brought up the subject of that check for \$40.00 that had bounced, that you had given him in July?

A. At that time he did not, because he knew the check was that way when I gave it to him.

Mr. Wilson: We move to have the answer stricken, if the court please, and the jury instructed to disregard his voluntary statement, on the part of the witness. [65]

(Testimony of George Henry Booth.)

The Court: All right.

Q. (By Mr. Wilson): Didn't you tell Mr. Cosenza right then and there that you had a contact in San Francisco and that that is where this jewelry all came from and it was safe?

A. I did not, not in San Francisco. I told him it came from the East and from Oklahoma.

Q. What did you use, "East" or "Oklahoma"?

A. Well, I told him it came from the East; Oklahoma and Texas.

Q. And didn't you ask Mr. Cosenza in that same conversation during the absence of Mr. Skipper where he was working?

A. I don't believe I asked him because I already knew.

Q. And didn't you make a statement to him that you would be down to see him in a few days about the check?

A. There was no conversation about that check.

Q. Did you make a statement to him that you had sales already made of this jewelry to a fellow named Art Funk?

A. I didn't make that statement to him, no.

Q. Did you have such a sale?

A. Well, I didn't have any sale, no. [66]

Q. Was he one of your prospects?

Mr. Thurman: I object as immaterial and irrelevant whether he was a prospect or not.

The Court: Yes.

Q. (By Mr. Wilson): Did you make any statement there either to Mr. Cosenza or to Skipper concerning the value of this jewelry?

(Testimony of George Henry Booth.)

A. I didn't appraise it, if that is what you mean. I told him it was worth, what I showed him, easily \$10,000.00.

Q. Did you tell him what the other prospects were offering for it in that conversation?

A. I don't believe I did. I don't remember it.

Q. Didn't you say you had an offer of \$6,000.00 from a gentleman by the name of Mr. Funk?

A. No, I don't believe I did.

Q. Did you use the name of Don Stewart any?

A. Not in that meeting.

Q. Did you use the name of Mr. Murphy?

A. At that meeting the only conversation there was between Skipper and I and Cosenza and the bartender and there was nobody else mentioned that I remember.

Q. With reference to the value, are you sure you [67] didn't tell them what other people were offering you for it?

A. I don't remember making any statement like that or telling him.

Q. Well, as I understand, after that then you left Skipper's Buffet and according to your story you returned to the house on West Madison Street and Mr. Cosenza went his way, is that right?

A. I returned to my car.

Q. Well, where was it parked?

A. It was parked in that vicinity.

Q. By the way, is that your home in the 1500 block on West Madison? A. No, it is not.

Q. Had you been living there? A. No, sir.

Q. You never had lived there? A. No, sir.

(Testimony of George Henry Booth.)

Q. To whom did the house belong?

A. Well, it belonged to Lona Lane. She was boarding my boy there.

Q. Two or three days after that conversation at Skipper's you went to the Jefferson Bar and talked to Mr. Cosenza, didn't you?

A. Well, I don't know exactly what day it [68] was. Shortly after that I talked to him, yes. I talked to him up to the time I went to California.

Q. Was the subject of that check brought up at that conversation at the Jefferson Bar two or three days after the conversation at Skipper's?

A. Not that I remember at that time.

Q. And didn't you, at that time, again reiterate to this defendant that you had sales for that jewelry in prospect and as soon as you completed one you would give him the \$40.00?

A. No, I did not.

Q. Did you return to the bar several days after that first conversation down there?

A. Yes, I returned to the bar several times.

Q. Did you ever pay the check?

A. No, sir; I didn't, because I didn't owe it.

Q. The second time you were in there was the check given to you?

A. He gave me the check, yes.

Q. And how did he happen to give it to you?

A. Well, he came into the rest room and gave it to me.

Q. Was there any argument over the check or over your paying it at that time?

(Testimony of George Henry Booth.)

A. Well, I don't know as there was any [69] special argument about it.

Q. Was there any ill feeling between the two of you respecting the check at that time?

A. Well, the check was given to me, of course. He fingered a burglary for me——

Mr. Wilson: Just a minute. I asked you a definite question, whether there was any ill feeling engendered as a result of that check at that meeting?

A. I don't know as there was.

Q. Did you make a statement to Mr. Cosenza at that time that you felt you didn't owe him the check because you had to pay more of your share of the expenses on the transfer of that liquor license a year ago than he had paid?

A. That liquor license had nothing to do with it.

Q. And didn't he, Mr. Cosenza, then pull the check out of his pocket and say, "If you feel that way, take that check and do anything you want to with it," or words to that effect?

A. He just merely said, "Here is that check."

Q. Didn't he tell you thereafter to stay away from that bar room?

A. He did not.

Q. Didn't you several days after that return to the [70] bar room with a fellow by the name of Charley Kobus?

A. I believe I did.

Q. Charley Kobus is a man that weighs around 200 pounds and about your age, is that right?

A. Yes.

(Testimony of George Henry Booth.)

Q. And he has quite a reputation for being a pugilist, or something of that character?

Mr. Thurman: If he knows.

Q. (By Mr. Wilson): Do you know that—all right, isn't that true?

A. I returned there with him, yes, and had a couple of drinks.

Q. And you started a quarrel with Mr. Cosenza, didn't you, there, you and Charley Kobus?

A. No, Charley Kobus did not.

Q. Did you start one?

A. I merely told him what I thought about him, that is all.

Q. You told that to Mr. Cosenza? A. Yes.

Q. Mr. Cosenza threatened to call the police if you didn't get away from there and stay away?

A. He did not.

Q. When you left at his invitation you told him you were going to get him some way or other, [71] didn't you, or words to that effect?

A. I did not.

Q. And you do have considerable ill will against this man right now, don't you, as a matter of fact?

A. Not especially.

Q. And you do want to see him convicted in the worst kind of way in this case, don't you?

A. It makes no difference to me. I am just clearing up my case as a witness, that is all.

Q. And you are willing to resort to any kind of tactics to have him convicted?

(Testimony of George Henry Booth.)

Mr. Thurman: I object to the form of the question.

The Court: Oh, yes, that is improper.

Q. (By Mr. Wilson): What did you tell Mr. Cosenza that you thought of him? Can you recall your exact words at that last meeting when Mr. Charley Kobus was present?

A. Well, that, I can't exactly remember. I told him he was the first man that ever accused me of double crossing him, that I had not done it that way. Concerning this burglary that he fingered for me that I had done, that he was up on 24th Street and Camelback Road as an alibi for. Well, I done it and he accused me of getting [72] money which I didn't get there.

Q. That was a burglary that was committed out in the vicinity of this house on West Madison Street? A. Yes, West Madison, yes.

Q. There was only the two of you in that, you and Mr. Cosenza, is that right?

A. That is right.

Q. When did that take place, can you tell me?

A. I couldn't tell you the exact date.

Q. Well, can you give me the month, or can you even give the year that it took place, Mr. Booth?

A. Well, in '49, in July, around that time. It is the very night that he gave me the money for that check, the very night.

Q. What time of the night did the burglary take place?

A. Took place between 8 o'clock and about 10 or 11, or about 11—8 and 11.

(Testimony of George Henry Booth.)

Q. Way out on West Madison, is that right?

A. Yes.

Q. And Mr. Cosenza was working at the El Rancho up until one o'clock that night, is that right?

A. That is right, it was his alibi. He was. [73]

Q. So he assisted you in the burglary?

A. He told me what the man had there and he knew the man and what was there and he wanted to be working while it was done.

Q. I see. How many burglaries have you pulled in this town or in this vicinity, Mr. Booth?

Mr. Thurman: I didn't get the question.

(The question was read by the reporter.)

The Witness: Possibly 30.

Q. (By Mr. Wilson): Has Mr. Cosenza ever disposed of anything as a result of those burglaries?

A. He has tried to.

Q. Has he ever disposed of anything for you that you got out of these burglaries?

A. As far as I know, he has not.

Q. Did Charley Kobus ever dispose of anything for you?

Mr. Thurman: I object as being irrelevant, incompetent and immaterial.

The Court: Yes.

Q. (By Mr. Wilson): All right. Have you ever been convicted of a felony prior to this present conviction of yours? A. No, sir; I have not.

Mr. Wilson: I think that is all. [74]

(Testimony of George Henry Booth.)

Redirect Examination

By Mr. Thurman:

Q. Mr. Booth, you have no prior conviction prior to the crime that you are now incarcerated for, is that correct?

A. No, sir; I have no prior.

Q. That is your first conviction?

A. The first conviction, yes, sir.

Q. Now, did you make any arrangements with this man by the name of Skipper to display this jewelry to him in Phoenix, Arizona, about December 1st, 1949?

A. Well, through Mr. Cosenza, yes.

Q. And, did you meet him and make any arrangements yourself? A. No.

Mr. Wilson: We object on the ground, if the court please, that is a part of the examination in chief, gone into and it is improper redirect examination.

Q. (By Mr. Thurman): I didn't ask him that in chief. Now, what about this check deal. Mr. Wilson asked you about it. Why was that check—why did it come into being?

A. Well, Cosenza was always telling me about some job to do and he told me about this one job and [75] that was on West Madison, this fellow he had formerly rented a store or had a bar out there, rented from him. He told me he got considerable cash, is the information he had got, and he said he couldn't do anything about it because he knew the

(Testimony of George Henry Booth.)

man and wanted to have an alibi, so he told me where I was to meet him and we looked at it together, where the man lived, because he told me he had been in the house. He said he knew the money was in his dresser drawer. At that time, I was a little bit short of money, so we arranged, he said he would have to be working out there, which he was working at the time, he would have to be working and he would rather have it done while he was working on the job. I told him, okay, it is all right if the money was there, so I went into the house.

Q. How did you enter the house?

A. Through the window.

Q. Through the window?

A. Yes, sir. I looked the house over.

Mr. Wilson: We object to that as not being material now.

The Court: Well, you started it.

Mr. Wilson: Well, I know. I have no objection to the conversation he had with the [77] defendant.

The Court: All right, go ahead, tell us.

A. He told me the man never kept nothing but cash there, no checks. I got in there. There was nothing there but except a gun and two pins and all checks, so I came out and brought what I had with me. There was some things also which I threw away. I was kind of up against it for money at that time, I mean, I was pretty short, so I went out to the bar and let him know that I done the job and completed it and what I had done and would he come out of the bar to the car and look at

(Testimony of George Henry Booth.)

the stuff, the gun and the two pins, and he said that he was surprised there was no money in there. I told him it was all checks in the dresser there, there was no money. He said, "What are you going to do with this gun?" I said, "I don't know what to do with the gun." I said, "You can keep the gun if you want it." He said, "All right, I will keep the gun, you can have the pins." I said, "I am kind of short of money now, I got to get out of town, the drive from Texas had me a little short of money." He said, "We will fix that." He said, "We will go to work, that will cost Lydel Hiett. You go in and sign a check, sign a phony name, so after I did that he would [77] give me \$40.00, so I went in. I asked what name to sign. He said, "Joe Blow," so I signed some phony name to it and he gave me the \$40.00 and I left. I took the \$40.00 and the two pins.

Q. But later he gave you the check back?

A. He gave me the check back. He accused me of getting a lot of money in the house. He said I got a lot of money and he knew I did. I said that I didn't. There was a little argument about me getting money. I didn't get any money.

Q. You say this particular incident happened during approximately the month of July, '49?

A. Well, it was around July, I believe.

Q. Now, prior to that time have you had any other activities with this defendant with respect to burglaries, or any other illegal transactions?

A. Yes, sir. He had a relative on South Central,

(Testimony of George Henry Booth.)

on up 1400, a bar, I believe it was his aunt, at one time that he told me that she had \$800.00 in there and they were off on a vacation, that he would cut the wires at the place if I would go in and get it. Well, he went in, went in and said, "I cut the wires." I told him to go back and check. He went back and checked. He said he fixed them good that time and cleared everything. I went in the place that night. He [78] drove the car. I went in in the back and the alarm went off. I took off, but it was his own aunt, one of his relatives that owned that place.

Q. Did you ever have any transactions with this defendant Cosenza, any happenings in Tucson, Arizona? A. Yes, sir; we did.

Q. Please tell the court and jury about those transactions?

A. Well, I told him, I left, he was with me, I believe the year, I believe it was March or April sometime.

Q. What year was that, '49?

A. I believe in '49, yes, sir; '49, and would go to Tucson and he was going to go along with us to pull a burglary, I mean, we were going to pull this burglary and he was going to dispose of the merchandise. Well, he couldn't go at that time and we went ahead, I believe it was March or April sometime, we went over there and met him at this Pago-Pago club, and we got over there and called him back, we had been in some house over there, I mean, we got in the house, a fellow by the name of

(Testimony of George Henry Booth.)

Dines Nelson, and there we got a bundle of coins and we got stamps and we got foreign money, miscellaneous bundles, and a suitcase full of [79] things, so we called Cosenza back and told him to come on over, that we had this stuff, and he came on over, so we—he came on over there, and I can't remember what the deal is. His car broke down, or something, but anyway, he was going to bring the loot back and dispose of it for us, but he brought it back—we brought it back and he couldn't find any deal for it and, so, I gave him some stamps.

Q. What kind of stamps were these?

A. Foreign stamps. They were just a stamp collection from a stamp collection. Then we—he couldn't dispose of any of this loot for us and we were pretty disgusted with him, I mean, his actions pertained to the thing, I mean, we missed all the foreign money, it got away somewhere or other mysteriously in the car, so we just went on and left him. That is all we had to do with him at that time.

Q. At the time you turned the stamps over to the defendant, where were you when you turned them over?

A. In his house, in his bedroom.

Q. Who else was there?

A. Well, at the time that I turned the stamps over to him that night, he got a suitcase full of [80] loot in the house, and the next morning we came out there. The stamps were there, except some of this money was gone and we gave him the stamps,

(Testimony of George Henry Booth.)

told him he could have the stamps and then there was some transaction there, he tried to sell one of the cameras to his brother, tried to peddle it around, but at first him and I was in the bedroom when I gave him the stamps, and I believe Wheeler was there too. I don't remember.

Mr. Thurman: You may take the witness.

Recross-Examination

By Mr. Wilson:

Q. Wasn't that about the time that you were attempting to dispose of another liquor license in conjunction with Mr. Cosenza?

A. After the one liquor license I dealt with Cosenza, him and George Sorenson, well, I didn't have a bit more dealings with Cosenza. I mean, I almost didn't get anything out of the liquor license. Him and George Sorenson just about got the money, so I didn't have too much——

Q. (Interrupting): Now, the question is, I know you are very anxious to convict the defendant, and all of that you have——

Mr. Thurman (Interrupting): Just ask the [81] witness the question.

Q. (By Mr. Wilson): Did you have any dealings at all at about that time that you just testified about concerning another liquor license?

A. Well, sir, we had several deals on liquor licenses.

Q. You were at Mr. Cosenza's house twice, I believe, in reference to that, were you not?

(Testimony of George Henry Booth.)

A. At what time?

Q. The time you just testified to along about May, April or March of '49?

A. No, sir; it was before that.

Q. You were at his house a time or two, weren't you?

A. Several times I have been to his house.

Q. And on one of those occasions you gave Mrs. Cosenza some stamps for her collection, didn't you?

A. I gave them to Raoul Cosenza.

Q. As I understand, again, Mr. Cosenza was supposed to dispose of the loot for you, and again he didn't do so, is that right, out of all of these burglaries that you have been telling us about?

A. He tried to. He said——

Q. (Interrupting): Did he dispose of any [82] of it for you?

A. I can't remember him selling one thing.

Q. On that occasion, which I believe was the occasion of these burglaries in Tucson, you gave him some coins, you gave him a suitcase full of loot, cameras, and so forth, is that right?

A. Yes.

Q. And he promised to dispose of that, is that right?

A. Yes.

Q. And he never disposed of any of it, is that right?

A. Yes.

Q. And he gave that all back to you, is that correct?

A. Yes, except the money and the stamps.

Q. And you were very much disgusted with him

(Testimony of George Henry Booth.)

over that, is that what you testified to on direct examination just now?

A. I was a little disgusted with him, yes.

Q. And in spite of that fact you believed he would go ahead and dispose of the other loot that you would acquire over in Oklahoma, is that true?

A. Well, I figured the man, he said he could.

Q. But in all these many burglaries, Mr. Cosenza, this defendant, never disposed of one [83] article for you, did he?

Mr. Thurman: It has been asked and answered I don't know how many times.

Mr. Wilson: Yes, it has been asked and answered a number of times. Withdraw it. That is all.

Redirect Examination

By Mr. Thurman:

Q. This gun that you gave Cosenza at the time you robbed the place and got the pins, burglarized the place and got the pins, did he ever return that gun to you? A. No, sir: he didn't.

Mr. Thurman: That is all. You may be excused for the present.

(Thereupon the witness was excused.)

Mr. Thurman: Mr. Nichols.

FRED NICHOLS

was called as a witness on behalf of the government,
and being first duly sworn testified as follows:

Direct Examination

By Mr. Thurman:

Q. Mr. Nichols, you are a member of the police
department [84] in the City of Phoenix, Arizona?

A. I am.

Q. And you are on the detective force?

A. That is right.

Q. And Captain Young is your immediate su-
perior officer? A. He is.

Q. And was he such officer during the year,
we will say, '49? A. Yes, sir; he was.

Q. Still is? A. Yes.

Q. Now, as such officer did you have occasion
to investigate, to make it short, the stolen jewelry?

A. Yes.

Q. And did any other officer accompany you
on this particular investigation?

A. Detective Harry Roberts.

Q. And I assume that he belongs to the same
department? A. That is correct.

Q. Now, in this particular investigation did you
meet up with this man Booth? A. I did.

Q. And where did you first meet him? [85]

A. Reno, Nevada—wait a minute, when I first
had any deals with him was in Reno, Nevada. I did
observe him in Hawthorne, California, and Los
Angeles and arrangements made to pick him up in
Reno, Nevada.

(Testimony of Fred Nichols.)

Q. You did meet him in Reno, Nevada?

A. That is right.

Q. When you met up with him in Reno, Nevada, who was with you?

A. Detective Roberts and Detective Walter Steward of the Robbery Squad, Los Angeles Police Department.

Q. And what took place in that city?

A. Pardon?

Q. What took place where you picked up the defendant in Reno, Nevada?

A. We picked up the suspect in Reno, Nevada, at which time we placed him in the County jail. We questioned him and he signed a waiver.

Q. Let's go into the jewelry. What happened after you arrested him?

A. After we arrested him we questioned him in regards to the jewelry. At that time he would not give us any information in regards to the jewelry. During our investigation of the case we found out that he had been at the 116 Club in [86] Reno. We then went to the 116 Club in Reno and talked to the proprietor, Mr. Donald Ripper, for approximately two hours. We then informed him we would be back the next day.

Mr. Wilson: We object, if the court please. I don't think that is material or has any bearing on the charge here.

The Court: All right.

Q. (By Mr. Thurman): Handing you Govern-

(Testimony of Fred Nichols.)

ment's Exhibits 1-A to E, I will ask you if you can identify those? A. Yes, sir; I can.

Q. Where was the first time you ever saw those exhibits?

A. The first time I ever saw these was when we dug them up 14 miles east of Reno.

Q. They are the same exhibits that you dug up 14 miles east of Reno? A. They are.

Q. In Reno, Nevada? A. Yes.

Q. And about what date was that, if you can tell us approximately?

A. I believe it was on May 26th.

Q. What year? A. '50.

Q. And who was there when they were dug [87] up besides yourself?

A. At that time Detective Roberts was there, Sheriff Ray Roote, from Reno, a couple of FBI agents and the under-sheriff, and photographs were taken before these were dug up out of the ground and the defendant, or, not the defendant, but George Booth was with us.

Q. Did he identify them at that time?

A. Yes, he did. He took us right to the things.

Q. Then after these were dug up, who obtained possession of them?

A. We placed them in the vault in Sheriff Ray Roote's office in Reno.

Q. Did they ever get to Phoenix?

A. Pardon?

Q. Did they ultimately get to Phoenix?

(Testimony of Fred Nichols.)

A. Yes, we brought them back to Phoenix ourselves.

Q. Who did you deliver them to after you got them here?

A. We delivered them right to the Police Department, Captain Young.

Q. Now, are you acquainted with the defendant in this case, Raoul Cosenza?

A. I am since I have been working on this [88] case, yes.

Q. And when was it that you first met the defendant?

A. I believe it was on June 7th, 1950.

Q. Whereabouts?

A. At the Police Department.

Q. And was he under arrest at that time?

A. At that time he was not, no.

Q. Who was present?

A. Detective Roberts, Captain Young, and, I believe George Wilson or Sorenson was.

Q. Can you tell us what time of the day it was?

A. It was in the afternoon along about two o'clock, I believe—one o'clock, something like that.

Q. Was this jewelry present there at that time?

A. No, it was not present there at that time. It was in the property locker.

Q. Did you discuss with the defendant any of the particulars of this case?

A. Yes, we did.

Q. In substance what did you say to the defendant and what did he say to you and the others that

(Testimony of Fred Nichols.)

were then and there present at that [89] time and place?

Mr. Wilson: Just a minute, please, Mr. Witness. If the court please, may I inquire of the witness whether a stenographic report was made of the conversation?

The Court: Was it reported?

The Witness: No, it was not reported.

The Court: All right, go ahead.

The Witness: We asked the defendant if he knew Booth, George Booth.

Q. (By Mr. Thurman): When you speak of "Booth," you mean the man that preceded you on the witness stand?

A. I guess he preceded me, yes—George Booth and Oliver Eugene Wheeler, who was an accomplice in these burglaries with George Booth. First he said he didn't know them. We then showed him a picture and told him we had information that he did know him, and he identified knowing them, after that he said he knew him, and we questioned further regarding his activities with Booth and the jewelry and told him we had information that the jewelry had gone into Skipper's bar, that he was in company with Booth at the time it was taken there and he said they had taken it to Skipper's bar but he didn't know [90] it was stolen, had any idea it was hot, at which time I believe Mr. Sorenson said, "I think you said enough already."

Q. Was anything said to the defendant Cosenza at that time concerning any stamps?

(Testimony of Fred Nichols.)

A. We told him we had gotten stamps from his home which Booth told us that he had given to Cosenza to give to his wife. On June 5th we had obtained a search warrant, went to the defendant's home with the search wararnt and before we showed the search warrant to his wife we asked about anything he had brought there. She said he had not had anything there in regards to Booth or any stolen articles. We then showed her the search warrant and she took us into the bedroom and gave us numerous packages of foreign stamps which she said had been given to her by her husband and George Booth had given them to her husband.

Q. And what did you do with the stamps?

A. They were brought into the police station and placed in the property locker.

Q. Are they still there, do you know?

A. I don't know if they are still there or not.

Q. Did you tell us what Cosenza said about the stamps, if anything, at that time? [91]

A. He said that Booth had given them to him to give to his wife.

Q. At the time you went to the Cosenza home here in Phoenix, Arizona, with the search warrant, did you find anything else in addition to the stamps that you mentioned?

A. No, we didn't find anything else. There was some coins we brought in thinking they might be out of the place where the stamps were taken, which was the Dines Nelson home in Tucson, as they

(Testimony of Fred Nichols.)

missed old coins, but Mr. Dines could not identify them——

Mr. Wilson (Interrupting): Just a minute——

Mr. Thurman: You may cross-examine.

Cross-Examination

By Mr. Wilson:

Q. Officer, showing you Defendant's Exhibit Number A for Identification—I mean, Government's Exhibit 1-A for Identification, can you throw any light, Officer, upon who possibly took out some of the diamonds out of this?

A. I could not. On our report when this was picked up it was shown in our report when it was turned in that these were missing.

Q. Do you have that report with, perchance, [92] Officer?

A. No, sir; I do not.

Q. Where is it, is it filed?

A. It is a property slip which is with the property clerk at the police department.

Q. That is Mr. Charles Sittenfeld?

A. Yes, sir.

Q. Did you find all of that jewelry in that whole display there on the table in the possession of the Government's attorneys?

A. May I look at it again before I answer that question, all of it.

(Thereupon the articles were handed to the witness.)

The Witness: Yes.

(Testimony of Fred Nichols.)

Q. That was all taken out of that hole, is that right? A. I believe it was, yes, sir.

Q. You never saw any of that in the possession of Mr. Booth prior to your finding it in that hole?

A. No, I never saw any of them in his possession.

Q. Then your other connection with this case, is, I believe you testified, that you made a search of the defendant's home along about the 5th day of June, 1950, is that right? [93] A. Yes.

Q. That was a couple of days before you had this conversation with the defendant down there in the police department when his attorney, Mr. Sorenson, was present? A. That is right.

Q. And when you wanted to have that conversation all you did was to call the defendant, Mr. Cosenza, and he came right down, hadn't he?

A. I had been looking for him for two days and his wife told me he was out of town.

Q. All you did was to call and he came right down, isn't that true?

A. I don't recall, but he came there.

Q. The reason you got that search warrant was because the man named George Henry Booth told you he had turned over a lot of loot to Mr. Cosenza, the fruits of certain robberies that Mr. Booth had committed, is that right? A. That is true.

Q. He gave you quite a number of articles, didn't he, guns, cameras, and so forth?

A. That is correct.

Q. Did you find any of that in the home of Mr. Cosenza?

(Testimony of Fred Nichols.)

A. Such as guns or cameras? [94]

Q. Guns, cameras?

A. No, no guns or cameras.

Q. Or did you find any container that they could have been contained in, such as a suitcase, such as Mr. Booth testified? A. No, sir.

Q. Did you ever ascertain whether or not the defendant had ever disposed of any such articles or not in the City of Phoenix in your investigation? A. I did not.

Q. Outside of the stamps that Mr. Booth told you about, did you have any other information that this defendant ever had in his possession any such articles? A. Such as guns or cameras?

Q. Yes.

A. Yes, his brother, I believe his name is Paul, said he tried to sell him a camera.

Q. And did he say when it happened or what kind of camera it was?

A. No, he said they wanted too much money for it, they asked \$75.00 for it, and I believe 75, and it was too much money for it.

Q. That was Paul, you say?

A. I think that is his name, he lives down [95] approximately at 1400 Palm Lane, something like that, 14th Street.

Q. Aside from that, who else ever told you that Mr. Cosenza ever had any of that loot that Mr. Booth said he had delivered to him?

A. You are talking about the guns and cameras?

Q. Yes.

(Testimony of Fred Nichols.)

A. Or in regards to the jewelry here?

Q. Well, any of it, I am not trying to limit it to one article.

A. Mr. Skipper Hooper, from Skipper's, said they had been in there and tried to sell some stuff but he wouldn't have anything to do with it.

Q. All right. Mr. Skipper is a witness here, is he? A. I believe he is.

Q. Yes. All right, and that is the extent of your information that Mr. Booth told you about delivering any loot at all over to this defendant, is that right, Officer? A. That is right, yes.

Q. Now, you say that in that conversation that you had in the police department on the 7th day of June, 1950, with the defendant, that he made certain admissions to you. Did he ever admit that Mr. Booth had ever given him any of the articles [96] we have enumerated, guns, cameras, jewelry or anything else? A. I don't know as he did.

Q. Didn't Mr. Booth, in his confession to you prior to that time, say that Mr. Cosenza had been engaged in a number of robberies with him, or burglaries?

A. He said he did. He said he pointed out a number of places for him to burglarize.

Q. Did you ask Mr. Cosenza about that in that conversation?

A. We didn't have much of a chance to talk to Mr. Cosenza, because Mr. Sorenson spoke up and

(Testimony of Fred Nichols.)

said, "I think you said enough already" and that was the end of the conversation.

Q. How long was that conversation in progress?

A. I wouldn't say it was over 15 minutes.

Q. Well, if your fellow officer, Mr. Roberts, said it was an hour, would you dispute it?

Mr. Thurman: I object as argumentative.

The Court: Yes.

Q. (By Mr. Wilson): All right, and wasn't it after all, every bit of the matter had been gone into, Officer, that Mr. Sorenson spoke up and said, "Well, that concludes it," or, "We have said enough and we are going to leave"? [97]

A. We had attempted to question the defendant; he would not talk, he wouldn't mention anything. When he finally did decide to talk, Mr. Sorenson said, "I think you said enough, we had better leave."

Q. You don't know how long the defendant had been talking up to that point, is that it?

A. No, it wasn't very long.

Q. 15 minutes?

A. I think I answered that question a while ago.

Q. Was the statement made either by Mr. Sorenson or by Mr. Cosenza when the meeting broke up on that occasion, that if you wanted any additional information Mr. Cosenza would be available at any time?

A. Yes, it was.

Q. And you went right down and issued a

(Testimony of Fred Nichols.)

warrant then, didn't you, or had you done that previously? A. We had done that previously.

Q. You didn't inform Mr. Cosenza that you had warrant right then in your pocket for Mr. Cosenza, did you? A. I did.

Q. But you didn't arrest him or make any [98] attempt to?

A. I didn't arrest Mr. Cosenza and I can tell you why.

Q. And you didn't arrest him until 6 o'clock that night?

A. I didn't arrest him at 6 o'clock. He waited until after I came home and he came in.

Mr. Wilson: That is all.

Redirect Examination

By Mr. Thurman:

Q. Why didn't you arrest him at that time?

A. At that time Mr. Cosenza stated that he had a liquor license to sell to a man from Superior who had come down, was going to be here at 2 o'clock, I believe, and in talking it over with the captain, he said, "That is all right, let him go out to the capitol building and make his business transaction and have him back here at four," because I went home at five o'clock. I talked to Mr. Cosenza and he said, "That is fine," and Sorenson was there, but they left and they did not come back until after I had gone home, and when he did come in, he came in with Mr. Sorenson.

(Testimony of Fred Nichols.)

Q. He came in with Mr. Sorenson?

A. They came in later that night after I [99] had gone home, after he had promised me he would be back at four o'clock.

Mr. Thurman: That is all.

Mr. Wilson: That is all.

(The witness was excused.)

The Court: We will have our afternoon recess at this time. Keep in mind the court's admonition.

(Thereupon a short recess was taken, after which, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Thurman: Mr. Cook.

VINCENT E. COOK

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Direct Examination

By Mr. Thurman:

Q. Your name is Vincent E. Cook?

A. That is right.

Q. And you are employed at Skipper's bar here in Phoenix, Arizona? A. Yes, sir.

Q. And during the month of December, [100] 1949, were you such an employee? A. Yes.

Q. And did you ever have occasion on or about the latter part of December, 1949—the first of De-

(Testimony of Vincent E. Cook.)

ember, 1949, to meet this man George Henry Booth? A. Well, I saw him, yes.

Q. You saw him about that time?

A. Around that time. I don't know the exact time.

Q. Well, it was the early part of December?

A. Yes—well, I wouldn't be sure about it.

Q. Well, who was with him at this particular time you have in mind, if anyone?

A. Well, the time that I saw him?

Q. Yes.

A. The first time I saw him was in the cocktail lounge.

Q. Who was with him then?

A. He was by himself.

Q. He was by himself? A. Yes.

Q. And immediately prior—you saw him in the cocktail lounge at Skipper's? A. Yes.

Q. Did you see the defendant? [101]

A. No.

Q. Did you see the defendant there that day?

A. Well, I saw him walk through the place, through the bar and then into the office.

Q. Where was Booth at that time?

A. He was still in the—sitting in the booth.

Q. Sitting in the booth, Booth was in the booth?

A. That is right.

Q. And Cosenza walked through where, did you say?

A. Walked through the bar into the office, which is in the rear of the bar.

(Testimony of Vincent E. Cook.)

Q. Whose office is that?

A. That is Skipper's office.

Q. I'd like to know Skipper's name?

A. Skipper Hooper. He is the owner.

Q. Could you give us the time of that approximately? A. Time of day?

Q. Yes.

A. I'd say it was the afternoon sometime, say, around one or 1:30, somewhere around there.

Q. And how do you fix the time, we will say, approximately 1:30? [102]

A. Well, Skipper doesn't usually come down until after 12 o'clock anyway, so it had to be about the afternoon.

Q. Now, after you saw the defendant Cosenza go into Skipper's office, what else did you see at that time?

A. Well, I didn't see anything else.

Q. You didn't see anything else?

A. I didn't see Booth. The first time I saw Booth he was in the office.

Q. Booth was in the office? A. Yes.

Q. And when was Booth in the office—who else was in there?

A. Well, the defendant and also Skipper Hooper.

Q. The three of them? A. Yes.

Q. Did you see anything else besides Skipper, Booth and Cosenza in the office at that time?

A. Did I see anything else?

Q. Yes. A. I saw jewelry.

Q. You saw some jewelry. Do you remember what it looked like?

(Testimony of Vincent E. Cook.)

A. Well, I could probably—— [103]

Q. (Interrupting): Handing you Government's Exhibits 1-A to E for Identification, I will ask you if you can identify any of them?

A. Well, I couldn't say positive, but this piece, of course, is outstanding.

Q. Could you tell the jury approximately how many pieces were there?

A. Oh, gosh, several. I don't recall.

Q. But you distinctly——

A. (Interrupting): I remember seeing that piece and maybe the watch here.

Q. And you remember distinctly of seeing Exhibit 1-A for Identification, which is a bracelet?

A. Yes.

Q. Now, could you tell us why this bracelet sticks out in your mind, Mr. Cook?

A. Well, it is the largest piece that was there and it does—I just looked at it.

Q. And how long were you in this room?

A. Not very long. I went into the office, through the office to the liquor room. We have a liquor room in back of the office to bring out some stock and saw the jewelry on the table and looked at it and went on back.

Q. Did you have any conversation with anyone while [104] you were in there looking at the jewelry?

A. Oh, I made some remarks, kidding remarks about the jewelry, like that.

Q. And then you went out?

A. Yes.

(Testimony of Vincent E. Cook.)

Q. Then where did you go?

A. Back to the bar. I was working behind the bar.

Q. And after you had been in the room and seen the jewelry and went behind the bar, did you see either Skipper or Cosenza or Booth immediately after that?

A. I saw Skipper a little after that.

Q. A little after that? A. Yes.

Q. And who was with him at that time?

A. He came out by himself.

Q. Came out of where?

A. Came out of the office and sat down in the front of the bar and had one of the pieces of jewelry in his hand. I think it was the piece I identified there.

Q. That was one of the pieces of jewelry that you had seen in the office? A. Yes.

Q. And what was done between you and Skipper at [105] that time?

A. Well, he just looked at it in the light and asked me what I thought about it, and, so, I was not interested in it, and he said he wasn't either, and went on back to the office.

Mr. Thurman: You may cross-examine.

Cross-Examination

By Mr. Wilson:

Q. Mr. Cook, did you make an offer of \$600.00 for that piece of jewelry you saw there?

A. No, I didn't.

(Testimony of Vincent E. Cook.)

Q. And if Mr. Booth testified before this jury under oath that you did——

Mr. Thurman (Interrupting): Just a minute; I object to that as improper cross-examination.

The Court: Yes, he said he didn't make the statement, so that settles that.

Q. (By Mr. Wilson): Did you hear anybody else make any offer to Mr. Booth?

A. No, I didn't.

Q. Or did you hear Mr. Booth place any valuation upon any of the jewelry?

A. Well, I heard the remark about \$10,000.00 for the lot, but I didn't actually hear it myself.

Q. What time did you go on shift that day, [106] may I ask, Mr. Cook?

A. We open at nine. I usually go to work about eight.

Q. And do you have any time off for luncheon?

A. No.

Q. Work straight through. Is there another bartender on duty at that time? A. No.

Q. So you were left alone to wait upon the trade that is usually rather heavy at that time, isn't it. A. Yes, yes, sir.

Q. Beg pardon? A. Yes, it is.

Q. And there are two rooms in Skipper's cafe there, or bar, whatever it is called, one that has a long bar in it and west of that is the cocktail lounge or room, is that right?

A. Yes, that is true.

(Testimony of Vincent E. Cook.)

Q. And there is a sort of archway, an entrance between the two? A. Yes.

Q. And in the cocktail lounge, I believe, there are a number of booths around the walls, and tables? A. Yes. [107]

Q. And was it in there that you saw Mr. Booth sitting? A. Yes, it was.

Q. The first time, sitting alone? A. Yes.

Q. You can't tell us, I take it, you can't fix the date of that occasion any more definitely to say it was about the first of December, is that right?

A. That is right.

Q. It could have been, I take it, the last day or two of November, or the first day or two of December? A. It could have been.

Q. But it was within that range there somewhere, wasn't it? A. Yes.

Q. Within a three or four day range, isn't that true? A. Yes, I would say so.

Q. You were acquainted with the defendant, weren't you, at that time? A. Yes, I was.

Q. I mean, Mr. Cosenza who is here on trial. You knew that he was doing business for Skipper in the transfer of various liquor licenses? [108]

A. Yes, I did.

Q. You know that right on that very day there was a deal for a Number 7 license pending, did you not? A. Yes, I knew about it.

Q. And you knew that Mr. Hooper, Skipper, had to get a Number 7 in order to complete a deal for a Number 6 that he was buying? A. Yes.

(Testimony of Vincent E. Cook.)

Mr. Thurman: I object, I don't see the proper cross-examination, no foundation laid for it.

The Court: No, it wouldn't make any difference anyway.

Q. (By Mr. Wilson): And Mr. Cosenza was in and out of that bar room every day, isn't that true?

A. I would say almost every day, quite often.

Q. He, himself, was working, was he not, down at the Jefferson at that time?

A. Well, I knew he was working down there. I think it was about that time.

Q. You did see Mr. Cosenza go into Skipper's private office? A. I did.

Q. Before you ever saw Mr. Booth sitting in that cocktail lounge? [109]

A. No, no, I saw Mr. Booth in the other room first.

Q. Do you know whether Mr. Cosenza was in talking with Skipper prior to the time you now testify you first saw Mr. Cosenza?

A. Well, I know that Mr. Cosenza went into the office first.

Q. Was he in company with Mr. Booth up to that point at all?

A. I didn't see him in his company.

Q. Did you ever hear any conversation when you were looking at the jewelry with respect to whether it was stolen property or not?

A. No, I didn't.

Q. Was any such statement made in your presence during that conversation?

(Testimony of Vincent E. Cook.)

A. No, it was not.

Mr. Wilson: That is all.

Redirect Examination

By Mr. Thurman:

Q. Mr. Cook, this time that you have mentioned when Booth was sitting in the booth and Cosenza had gone into the office with Skipper, had you ever seen these two people together in the bar there before; that is, Booth and this man Cosenza? [110]

A. Not together, not that I recollect.

Mr. Thurman: That is all.

Recross-Examination

By Mr. Wilson:

Q. Well, just a minute, you had never seen them together?

A. Not before seeing them in the office.

Q. Do you have any recollection of their being there, can you recall just in what order they left there, or anything? A. No, I don't recall.

Mr. Wilson: All right, that is all.

(Thereupon the witness was excused.)

Mr. Thurman: We now offer in evidence Government's Exhibits 1-A, 1-B, 1-C, and 1-D and 1-E for Identification in Evidence.

Mr. Wilson: Well, to which we object on the grounds that the ownership of that jewelry has not

yet been established, it has not been established that the defendant has—that it is stolen property.

The Court: Well, Booth said it was, how much more evidence do you want?

Mr. Wilson: Well, we do have to believe, I believe under the authorities as I read them, [111] you will have to have some evidence showing to whom it belonged, and so forth.

The Court: Well, all right, you have stated your objection. It will be overruled.

Mr. Thurman: Please mark these Exhibits in Evidence.

(Thereupon the articles were marked Government's Exhibits 1-A, 1-B, 1-C, 1-D and 1-E in Evidence.)

Mr. Thurman: The record may show that the exhibits are being handed to the jury for their perusal.

The Government rests, your Honor. [112]

Defendant's Case

Mr. Wilson: Call Mr. Hooper.

ROBERT S. HOOPER

was called as a witness on behalf of the defendant, and being first duly sworn testified as follows:

Direct Examination

By Mr. Wilson:

Q. Your name, please?

A. Robert S. Hooper.

(Testimony of Robert S. Hooper.)

Q. Are you the gentleman that is generally known as "Skipper"? A. Yes, I am.

Q. Are you the owner of Skipper's Buffet or Cafe here on Adams Street, Phoenix?

A. That is right.

Q. Mr. Hooper, were you served with a Subpoena Duces Tecum to produce certain records to this court? A. I was.

Q. Particularly a couple of checks. Have you got them with you? A. Yes.

Mr. Wilson: May I see them. [113]

(The witness hands documents to Mr. Wilson.)

Mr. Wilson: May I have these marked for identification?

(Thereupon the documents were marked as Defendant's Exhibits A, B and C for Identification.)

Q. (By Mr. Wilson): Mr. Hooper, are you acquainted with a man by the name of George Henry Booth? A. Yes, I know him.

Q. Did you know him prior to December 1st, 1949? A. I did not.

Q. Did you see George Henry Booth on December 1st, 1949?

A. I couldn't tell you the exact date. It was somewhere about that time.

Q. Is there any way you could fix the exact

(Testimony of Robert S. Hooper.)

date on any of these instruments that were just marked in evidence?

A. Well, I don't know how I could fix the exact date. Truthfully, these checks were concerning real estate deals——

Mr. Thurman: Just a minute, they are not in evidence, used for the purpose of refreshing the witness' memory. I don't think it is proper to testify——

Mr. Wilson (Interrupting): I am just asking you [114] whether either of these instruments would assist you in any way in fixing the exact date of his visit, say, within a day or two when it took place?

A. Well, it was around December 1st.

Q. What time that day did you arrive at your place of business?

A. Well, it was after lunch. I don't usually come in until noon.

Q. Your office is located in the rear of the business establishment, isn't it? A. Yes.

Q. Your business establishment consists of a bar room and then a cocktail room west of that, is that right? A. Right.

Q. And an archway entrance between the two?

A. Yes.

Q. Can you see the entrance door of the bar room, the street entrance from your office in the rear of the business establishment?

A. I can not.

Q. Did you see the defendant Mr. Cosenza on

(Testimony of Robert S. Hooper.)

or about the first day of December in your office?

A. Yes.

Q. Did you see the gentleman I have identified [115] as George Henry Booth in your office in Skipper's Buffet?

A. Yes.

Q. On that same date did you have any business transactions with Mr. Cosenza?

A. Well, I was on this deal.

Q. That deal pertained to what?

A. Well, two liquor licenses.

Q. Let me ask you whether or not Mr. Cosenza had ever done work of a similar nature for you prior to that time?

A. Several times.

Q. Do you know whether he was a duly licensed realtor for the State of Arizona?

A. I think so.

Q. Did you have any conversation with Mr. Cosenza relative to this business transaction, these liquor licenses that you just mentioned?

Mr. Thurman: I don't see the materiality of these liquor licenses. I object to it as irrelevant, incompetent and immaterial.

The Court: All right, I will sustain the objection.

Q. (By Mr. Wilson): You testified you had a business conversation with Mr. Cosenza at the time on the same date that Mr. Booth arrived there, is that [116] right?

A. Yes.

Q. That same day?

A. Yes.

Q. With reference to the time that Mr. Booth

(Testimony of Robert S. Hooper.)

was in your office, when did you have the conversation with Mr. Cosenza about the business?

A. Well, it was before that.

Q. About how long before, could you indicate?

A. Possibly an hour, half hour—three-quarters of an hour, somewhere about that.

Q. How long did that conversation—was it in progress?

A. Oh, 15 or 20 minutes, I presume.

Q. Was there anything at all said in that conversation respecting a visit by Mr. Booth later, in the next 15 or 30 minutes or 45 minutes?

A. No, there was not.

Q. Were you subpoenaed by the government, too, in this case? A. I was.

Q. Do you know whether or not Mr. Cosenza had other employment at that time?

A. I believe that he was employed at the Jefferson Cocktail Lounge. I am not sure.

Q. When Mr. Cosenza left your office [117] after your business discussion with him, was it only a few minutes before he returned with Mr. Booth, or about how long?

Mr. Thurman: Just a minute, I think it is leading and suggestive. Let's find out, let the witness testify.

The Court: Oh, he may answer.

(The question was read by the reporter.)

The Witness: Well, it was shortly thereafterwards.

(Testimony of Robert S. Hooper.)

Q. (By Mr. Wilson): And he had been in your office some 15 or 20 minutes, then, is that right?

A. That is right.

Q. Before he ever went out? A. Right.

Q. Do you recall the conversation that took place among the three of you, Mr. Booth, Mr. Cosenza and yourself, or anyone else that might have been present in your office, after Mr. Booth came in there? A. Conversation?

Q. Yes, among the three of you.

A. Well, Mr. Booth tried to sell me some jewels, yes, is that what you want to know?

Q. Yes. In whose possession did you first see those jewels? [118]

A. They were in Mr. Booth's possession.

Q. What kind of container did he have them in, if you know?

A. Well, I think it was a paper sack.

Q. Paper sack. How did Mr. Booth proceed to display the jewels to you there in your office?

A. Well, as I remember, he reached in the paper sack and laid them out on my desk. It was three pieces, I think.

Q. Did you at any time see that paper sack in the possession of this defendant, Mr. Cosenza?

A. Not to my knowledge.

Q. Now, will you tell what conversation ensued there at that time among the three of you?

A. Well, Mr. Booth said he had something to show me and produced these jewels and wanted to know if I would be interested, so, naturally, anyone

(Testimony of Robert S. Hooper.)

would take a look at them, which I did, and, so, I asked him what he wanted for them and he said \$10,000.00. I said, "Well, I am not interested, I don't have that kind of money for things like that," and that was about the consummation of the transaction between us, as I remember it.

Q. Do you know whether or not one of your bartenders by the name of Mr. Cook was in there at any time during the course of the [119] conversation? A. Yes, he was.

Q. Was any statement ever made by anyone, or was any offer made that you heard by anyone to Mr. Booth for any of the jewelry?

A. No, there wasn't that I know of.

Q. Was any price stated that they were willing to pay for it?

A. I didn't hear any price stated.

Q. Mr. Hooper, did you, during the course of the conversation, leave the room at any time?

A. Yes, I went out to the bar.

Q. And could you estimate about how long you were absent from the room?

A. Oh, five minutes or so.

Mr. Wilson: Cross-examine.

Cross-Examination

By Mr. Flynn:

Q. Mr. Hooper, on this day, the first of December, you say that this defendant came into your office first alone, is that right?

A. The defendant, may I clear myself, is Mr. Cosenza, is it?

(Testimony of Robert S. Hooper.)

Q. Yes, Cosenza. A. Yes.

Q. He came in there alone? [120] A. Yes.

Q. You spent how long in there with him before he went out?

A. Well, it was a matter of a few minutes, 20 minutes, or something.

Q. Now, did he say what he was going out for?

A. No, he had completed his deal with me.

Q. He was leaving, he was through with you?

A. As far as my deal was concerned, yes.

Q. How long after he went out of the office there was it before Booth came in there?

A. Well, it was not very long.

Q. Well, was it five minutes or half hour?

A. Well, 10 minutes or 15 minutes.

Q. And he came in there alone, did he, Mr. Booth?

A. Well, when I looked up from my work from my desk they were both in the office. I don't know whether they came in alone or how they came in.

Q. When you saw Mr. Booth in your office, Cosenza was with him when you first saw them inside of your office? A. That is right.

Q. Is that the first time you had ever seen Booth? [121]

A. To the best of my knowledge.

Q. The first time you ever knew who he was?

A. That is right.

Q. Did he or Cosenza at that time tell you who he was? A. Yes.

Q. What did they say?

(Testimony of Robert S. Hooper.)

A. Well, he said this gentleman, he didn't tell me his name, no, no, I am sorry, he didn't tell me his name.

Q. Did he tell you what his business was?

A. No.

Q. What did Cosenza tell you about Booth?

A. Well, this Booth said that he wanted to show me something.

Q. That is the first thing he said?

A. That is right.

Q. Walked into your office, a perfect stranger, and said he wanted to show you something?

A. That is right, because I was doing work and I looked up and astonished to see——

Q. (Interrupting): What did you say after he said that? A. I said, "Well, okay."

Q. Did he tell you what it was, he just said "something"? [122] A. Yes.

Q. He didn't say "Jewelry," did he?

A. No.

Q. Then afterward you said okay, then what happened then, what did Mr. Booth do?

A. He just displayed the jewelry.

Q. On the table? A. On my desk.

Q. And what did he say about it?

A. Wanted to know if I would be interested in it.

Q. In buying it? A. In buying it.

Q. And what did you tell him?

A. I looked at it, looked it over and then told him no.

(Testimony of Robert S. Hooper.)

Q. Now, you told him no before he told you that he thought he ought to get \$10,000.00 for it?

A. No, I didn't.

Q. Did you ask him where the jewelry came from? A. I did not.

Q. You didn't ask what his business was?

A. I did not.

Q. And he didn't tell you?

A. And he didn't tell me. [123]

Q. And Cosenza was in there all the time, the defendant? A. That is right.

Q. He didn't say anything, have any part whatever to do with this deal; took no part in it, is that right?

A. I don't remember him saying anything.

Q. You remember, Skipper, being interviewed in the Federal Bureau of Investigation office on or about June 7th, 1950? A. Yes.

Q. In the presence of John Hemphill, George Booth being the witness and Detectives Harry Roberts and Fred Nichols? A. Yes.

Q. You remember that interview?

A. Yes.

Q. I will ask you if at that time you didn't tell them, at that time when they came into your office, Cosenza had possession of the jewelry and that Booth was called into the conference after Cosenza had spread the jewelry on the desk in the back room for the purpose of display; did you make such a statement to these agents or officers at that time?

(Testimony of Robert S. Hooper.)

A. No, I didn't make such a statement. [124]

Q. Did they leave together?

A. Yes, they did.

Q. They both left together, and you say that——

A. (Interrupting): That is, they left my office together.

Q. They left your office together and went out together. There wasn't any arrangements made about seeing you again or talking about the jewelry again? A. Not any.

Q. When you left the office and went out to the bar, did you take some of this jewelry with you?

A. Yes, I did.

Q. What was the purpose of that?

A. To look at it in the light.

Q. You took it out to the bar room?

A. That is right.

Q. Did you have any light in your office?

A. My office has no windows in it.

Q. No windows; no electrical lights in there?

A. Yes.

Mr. Flynn: That is all.

Mr. Wilson: That is all.

(The witness was excused.) [125]

RAOUL ALFRED COSENZA

was called as a witness in his own behalf, and being first duly sworn testified as follows:

Direct Examination

By Mr. Wilson:

Q. Will you state your name, please?

A. Raoul Alfred Cosenza.

Q. And where do you reside, Mr. Cosenza?

A. 4400 North 20th Street, Phoenix, Arizona.

Q. Are you a married man and a family man?

A. Yes, I am, sir; I have four children.

Q. Your business is what as of this time?

A. As of this time I am a liquor license broker and I tend bar at night. I am working extra right now.

Q. How old a man are you, Mr. Cosenza?

A. 32 years old, sir.

Mr. Flynn: How old?

A. 32.

Q. (By Mr. Wilson): Are you a native Arizonan?

A. Yes, sir; I am, sir, born here in Phoenix.

Q. You went to the public schools of this city?

A. Yes, sir; public schools, high school and went to Tucson and went to school there. [126]

Q. Your business during the years '48, '49 and '50 was what?

A. Well, most of my business at that time was liquor license broker. I specialize in locating licenses for people and then I handle establishments.

(Testimony of Raoul Alfred Cosenza.)

Q. Were you a licensed broker?

A. Yes, sir; I was.

Q. License issued by the State of Arizona?

A. Yes, sir.

Q. Do you still have such a license?

A. I don't for this year, but I did up until this year.

Q. Are you acquainted with the witness, George Henry Booth? A. Yes, I am.

Q. About when did you first become acquainted with him?

A. Approximately September in 1948.

Q. And under what circumstances?

A. I was tending bar up at the Veteran's club on East Washington Street, approximately the 5900 block, East Washington.

Q. Are you a veteran? A. Yes, I am.

Q. That was in the month of September you say, [127] 1948?

A. Approximately September, '48.

Q. Did you then thereafter engage in the sale of liquor licenses in conjunction with Mr. Booth?

A. I did, sir.

Q. Will you tell the circumstances of that very briefly?

A. The license was in Jesus Panchos' name in Superior, Arizona, and we sold it to Leo Block and Ralph Stetson, and had located a license at Oracle Junction at Oracle, Arizona.

Q. How did you happen to become acquainted with Mr. Booth in connection with that?

(Testimony of Raoul Alfred Cosenza.)

A. Well, Mr. Booth had come out to the club and he and this gentleman he was with were discussing about a liquor license in Pinal County. Being a bartender, and I serve them, I interrupted their conversation and I asked them, I said, "If you are looking for a liquor license, that is my business, I know where we can find one in Pinal County."

Q. That was your first acquaintance with Mr. Booth, was it? A. Yes, sir.

Q. Did you complete a deal to transfer the [128] license? A. Yes, sir.

Q. Thereafter, did you have any business relations of any kind with Mr. Booth?

A. After that time he came to my house asking about liquor licenses and different leads that he had, one included that he had found here in Phoenix.

Q. Now, about when was that—what date was it that he visited your home?

A. Approximately March or April, sir, of '49.

Q. Let me ask you, how many visits, if you can recollect, did he make to your home?

A. About two, sir, at my home.

Q. Do you know whether or not on any of those visits he made any present either to you or to your wife?

A. I believe on the second visit he gave my wife some stamps for a stamp collection that she has.

Q. Your wife is a stamp collector?

A. She is a stamp collector, yes, sir.

(Testimony of Raoul Alfred Cosenza.)

Q. Other than that have you had any business dealings with Mr. Booth? A. No, sir.

Q. How often, from September, or after [129] you completed that first liquor transaction with Mr. Booth, how often did you see Mr. Booth on an average, generally?

A. Oh, once every three or four months, I can't tell.

Q. Did you know where Mr. Booth resided at that time? A. No, sir.

Q. Where would you see him then?

A. Usually when I was tending bar at some bar in Phoenix.

Q. Did you engage in any burglaries or other law violations in the City of Tucson?

A. Absolutely not.

Q. With Mr. Booth or any of his cohorts?

A. No one, sir.

Q. Were you at any time ever given any cameras, guns or any other loot from any burglaries committed by Mr. Booth or anyone connected with him in Tucson?

A. I was not at any time.

Q. Was your home ever searched by the police officers in an attempt to discover such articles?

A. Yes, it was.

Q. Were any of such articles ever found?

A. No, sir; except stamps that my wife [130] surrendered to the officers.

Q. Was it ever disclosed to you or to your wife, to your knowledge, that these stamps were the result

(Testimony of Raoul Alfred Cosenza.)

of any of his law violations? A. No, sir.

Q. Reference has been made to some coins. Was any coins, foreign coins ever given to you by Mr. Booth? A. None, sir.

Q. Or any ever given to your wife, to the best of your knowledge?

A. The only coins that my wife had in her possession were given to her by her brother, my brother and myself back in '45 and '46 after the war.

Q. Were they foreign coins?

A. They were foreign coins. They were Philippine, Chinese, Japanese, and then there was European coins, French, German Occupation money and that type of coin; European coins.

Q. As a result of the service of these various gentlemen in foreign military service of the United States? A. That is right, sir.

Q. Do you know whether or not the police officers had taken those and still have those [131] coins?

A. They still have them in their possession. They have never returned them to us.

Q. Mr. Cosenza, did you have any connection with the El Rancho bar in '49? A. I did, sir.

Q. And what was it?

A. I was running the bar on a percentage basis for the summer months, June and July.

Q. When did you terminate your employment at the El Rancho bar?

A. Approximately August 1st, sir.

Q. Were you working, or around that bar at

(Testimony of Raoul Alfred Cosenza.)

any time during the months of August or September of '49? A. I was not.

Q. You heard the testimony of Mr. George Henry Booth from that same witness stand, didn't you, this morning? A. I did, sir.

Q. In which he told us about the conversation had in the latter part of August or the early part of September about proposed burglaries, that is?

A. That is right, I heard the testimony.

Q. Did you have any such conversation [132] with him at that bar or anywhere else?

A. No, sir.

Q. You heard him identify or place that conversation either at the El Rancho bar or at the Jefferson Bar, is that right?

A. That is right, sir.

Q. Was there any such thing at that time as the Jefferson Bar?

A. There was no such thing as the Jefferson Bar.

Q. When was that Jefferson Bar first established, to the best of your knowledge?

A. We established it the latter part of August. By "we," I mean, Skipper Hooper and I located the license from——

Q. (Interrupting): When was it opened for business? A. November 8th.

Mr. Thurman: Let him answer the question, please. I was listening, I was interested in that question.

(Testimony of Raoul Alfred Cosenza.)

Mr. Wilson: May I have the question?

(The question was read by the reporter.)

Q. (By Mr. Wilson): Were you tending bar there during the months of August, September or October? A. I was not, sir. [133]

Q. Were you even working there at any of that time?

A. The only work I was doing is supervising work of installing the equipment, plumbing and wiring it, but it wasn't a job.

Q. When did that take place?

A. That took place from the last period, approximately the first part of October up to the opening day, which was November 8th.

Q. Were you at either bar then during the latter part of October, at a time when Mr. Booth says he returned from his burglaries in Oklahoma and had a conversation with you?

A. I was not, sir. I believe the latter part of October I was at Los Angeles.

Q. Going back—you say you were tending bar during the month of June and July at the El Rancho? A. Yes, sir; I was.

Q. Did you have any business transaction with Mr. Booth during the month of July?

A. The only transaction, sir, was a \$40.00 check.

Q. Will you narrate the circumstances under which that check—

A. (Interrupting): The best I can remember, that [134] night it was a pretty busy night and it

(Testimony of Raoul Alfred Cosenza.)

was the first days of July and at the time he was there and he asked me to cash a check for him and which I did.

Q. What was the amount of the check?

A. \$40.00, sir.

Q. Did you cash it? A. I did, sir.

Q. Was it deposited for the account of the El Rancho? A. That is right, sir.

Q. Do you know whether or not the check was honored by the bank?

A. It was not and it was returned to the El Rancho and I had to make the check good.

Q. When did you next see George Henry Booth after that episode of that check in July, 1949?

A. Approximately the first day of December.

Q. The same year? A. '49, yes, sir.

Q. After you went to work in the month of November for the Jefferson Cocktail Lounge, what were your hours of employment?

A. My hours of employment were—I was manager and I used to come down around noon, 1 o'clock, to see if we needed anything and about that time, [135] after the opening, from November 8th, I think, up until the holidays, we were serving hors d'oeuvres and I used to make the hors d'oeuvres and I would return and come to work at 5 o'clock and work to one o'clock.

Q. In the morning? A. Yes.

Q. How much time would you put in at noon?

A. An hour, hour and a half, whatever was necessary. Sometimes it was a little longer. They

(Testimony of Raoul Alfred Cosenza.)

were loading beer into the basement, our store room into the basement and I would take a little longer.

Q. At that time did you have any connection with Mr. Skipper Hooper? A. Yes, sir.

Q. What connection?

A. I was locating a license in November for Mr. Hooper that went to the Kennel Club, that is the Greyhound Dog Park here, and to complete this deal we had to have a Number 7 license, because the gentleman that owned the Number 6 in the Kennel Club wanted a 7 in return, plus his money, and we had been unable to find a Number 7, which is a beer and wine license, and I was in the process of searching for one at that time and I [136] had discovered one from a lady and I returned to Mr. Hooper's office to ask him if he would pay the lady's price for her license.

Q. What was the price?

A. \$1,650.00, sir.

Q. Did you have any conversation with Mr. Hooper respecting that deal on or about the first day of December?

Mr. Thurman: I object to it, I have been letting it go. I don't see the materiality of it, this man's activities searching for a license for people. I can't see it and I object to it; it is irrelevant, incompetent and immaterial.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Wilson): Were you in Mr. Skipper's bar room on the first day of December?

A. I was, sir.

(Testimony of Raoul Alfred Cosenza.)

Q. Did you see Mr. Skipper, as we call him?

A. Yes, sir; I did.

Q. Where did you see him at that time?

A. In his office.

Q. At about what hour of the day, if you can recollect?

A. The best of my recollection it was around one o'clock, 1:15—1:30, right in through there.

Q. Was Mr. George Henry Booth there at [137] that time when you went there?

A. When I first went into the office?

Q. Yes. A. No, he was not, sir.

Q. Did any conversation you had with Mr. Hooper at that time have anything to do with George Henry Booth or any jewelry?

Mr. Thurman: I object, it is irrelevant, incompetent and immaterial, a self-serving declaration of this defendant.

Mr. Wilson: Well, I don't know.

The Court: Yes, you just ask him what was said.

Q. (By Mr. Wilson): All right. What was your conversation then at that time with Mr. Hooper?

A. We discussed a Number 7 beer and wine license that he needed to complete his deal, and we did not discuss anything about jewelry or anything else.

Q. What was said about this Number 7 license?

Mr. Thurman: I object.

(Testimony of Raoul Alfred Cosenza.)

The Court: Yes, it does not tend to prove any issue in this case.

Q. (By Mr. Wilson): All right. Mr. Cosenza, you heard the testimony of Mr. George Henry Booth that on that date or about that date you came out to [138] a house located in the 1500 block on West Madison Street in a white or light colored Buick automobile, I believe, did you hear that testimony this morning? A. Yes, sir; I did.

Q. Did you own such a car at that time?

A. No, I did not, sir.

Q. Did you later on acquire such a car?

A. I did, sir.

Q. Did you have any car, automobile at all at that time? A. None at all, sir.

Q. You used the busses, did you, public busses to get around?

A. I usually used busses or I borrowed a car from one of my employers, Mr. Davidson.

Q. After you completed your business transaction with Mr. Hooper on the first day of December, or about that, where did you go?

A. I went outside to the bar and I ordered a drink and when I turned around to the cocktail lounge I saw George Booth sitting in one of the booths.

Q. Had you seen George Booth from the time he passed that check up to that minute?

A. No, sir. [139]

Q. What did you do then, if anything?

A. I walked over there towards him and I said,

(Testimony of Raoul Alfred Cosenza.)

"Hello," and I asked him where he had been and he told me he had been to California.

Q. Did he have any bag or anything else in his hand?

A. No, he didn't, sir. He asked me if Mr. Hooper was in the office. He said, "I'd like to show you and Mr. Hooper something."

Q. What happened; go ahead.

A. We walked into the office and Mr. Hooper was sitting at his desk and Mr. Booth displayed his jewels and then proceeded to try to sell them.

Q. Can you give us the conversation that ensued?

A. Well, the only thing I can remember, sir, he was trying to sell them and he wanted a lot of money for it and he didn't say anything like he testified here from this witness stand that they were stolen; he did not say that, and he did not say they were stolen in Oklahoma or anywhere else, and, he just, well, was just trying to sell them all like it was his business to sell jewelry, that is all.

Q. Have you seen the jewels that have been offered in evidence here? [140]

A. I have not seen them, sir.

Q. Well, showing you these various exhibits representing these jewels, can you recollect at this time whether you saw any of these jewels there on Skipper's desk?

A. I saw these three pieces.

Q. Had you ever seen any of that jewelry prior to that time?

A. No, sir.

(Testimony of Raoul Alfred Cosenza.)

Q. Did you ever pay a visit to this mysterious house located in the 1500 block on West Madison Street? A. Absolutely not.

Q. Do you know where it is located?

A. I don't even know.

Q. Do you know what house it is?

A. No, sir.

Q. Did you ever at any time ever point out any house to be burglarized by Mr. Booth at any time?

A. No, sir.

Q. In that lot, or anywhere?

A. Nowhere, nowhere else, sir.

Q. Or, did you have him go down and rob or burglarize the premises that belonged to any relative of yours, an aunt or any relative? [141]

A. Of course not.

Q. Did you at any time ever have in your physical possession any jewelry that Mr. Booth had in his possession?

A. None at all, sir, at no time did I ever have any of the jewels.

Q. Well, let me ask you if, during the course of that conversation in Mr. Skipper's office, Mr. Skipper left there at any time? A. He did, sir.

Q. And about how long was he gone, if you know?

A. About four or five minutes, I'd say.

Q. During that time did you have any conversation with Mr. George Henry Booth?

A. I did, sir.

(Testimony of Raoul Alfred Cosenza.)

Q. And could you enlighten the jury, please, as to what that conversation was?

A. Well, he was saying that he did not want to sell that jewelry piece by piece because he already had an offer for all of it for \$6,000.00, and he went on to tell me who the people were that was interested in buying the jewelry from him, and he, himself, mentioned Mr. Art Funk, Mr. Don Stewart, Mr. Haddad, Mr. Murphy, one of the Schiatte's, and he said that this Mr. Charley [142] Kobus had contacted these people for him and that is why he didn't care whether anyone gave him the \$10,000.00 or not, because that is what he was going to get for it and that was the end—when Mr. Hooper came back into the room, that was the end of the meeting, and that was it.

Q. Do you know whether or not any mention was made at any time during the course of that day while talking with Mr. Booth about this \$40.00 check?

A. I mentioned that check there to him; in fact, at first, and I asked him for my money and he said, "As soon as I sell some of this I will bring the money to you at the Jefferson Cocktail Lounge" where I told him I was working at that time.

Q. Is that about all that happened in that rear room at that time?

A. Yes, sir; that was about all.

Q. From that point on, what did you do and what did Mr. Booth do as far as you could observe him?

A. From that time on I stepped out of the office

(Testimony of Raoul Alfred Cosenza.)

and I went back to my drink that was on the bar and I believe there was a liquor salesman or someone there and I started talking to him and [143] Mr. Booth went out by himself, because I stayed there a few minutes, and after I left I went home, because it was my custom to go home to put on my white shirt to come to work and eat my dinner because I had to be back at 5 o'clock to go to work.

Q. Well, did you see Mr. George Henry Booth after that time, after that date?

A. Do you mean that day, sir?

Q. No, after that date.

A. I saw him a couple or three days later at the Jefferson Cocktail Lounge, yes, sir.

Q. Was he in company with anyone?

A. Not that one day.

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Will you please tell the jury what your conversation was?

A. Yes. I asked him again if he brought me the money for this check that I had to pay, pay it and make it good, and he said he had not and he didn't have the money, but he was still in the process of having to sell these jewels and he was very, very braggartly about it and boasting about it that it would just take a little time, so then he left again and I—— [144]

Q. (Interrupting): Did you see him after that then?

A. I did, he came back once again, yes, sir.

(Testimony of Raoul Alfred Cosenza.)

Q. Did you have a conversation with him on that second visit? A. Yes, I did.

Q. And about what time of the month was that second visit?

A. I'd say it was approximately the 9th or 10th of the month.

Q. Of December, 1949?

A. December, 1949.

Q. And were you on duty at the time?

A. Yes, I was.

Q. Was he with anybody at that time?

A. No, sir; he was by himself.

Q. Will you tell the jury, please, what conversation you had with him at that time?

A. Well, we started talking about the check again when he walked into the bar, so I saw that I was not getting anywhere with the man. Right away he started talking about this liquor license deal we sold in '48, he and I, the Superior, Arizona, license, and he said he got the short end out of this transaction, so I—he was argumentative at the bar. I said, "George, if you [145] want to discuss anything like that let's walk into the restroom." We walked back into the restroom there, the men's restroom. I told him right then and there I would rather have him stay out of the place and not to give me any more arguments and trouble and he could keep the check and we could just call things square, that I would just as soon have my peace of mind and not my work disrupted by him coming in and out of the place.

(Testimony of Raoul Alfred Cosenza.)

Q. Did he leave?

A. Yes, he did leave, left mad.

Q. Did you give him the check?

A. Yes, I did give him the check.

Q. Did he ever return to the bar room after that?

A. Yes, a couple of nights later he came in with Charley Kobus.

Q. Did you know this Charley Kobus prior to that time?

A. I didn't know him too well but I know him as an acquaintance, that is all.

Q. Did you have a conversation with Mr. Booth?

A. I did.

Q. Again in the presence of Charley Kobus?

A. Well, they sat at the bar. Of course, I served them and as soon as I served them then they [146] started making slurring remarks and started a little trouble there and, of course, Mr. Kobus made a couple of remarks there too and Mr. Booth, and the thing is, I told them right then and there, I said, "I don't want to have any trouble in this place, we just opened, and if you can't act like gentlemen I wish you both would not come back," so they must have suspected that I was going to call the police officers——

Mr. Thurman (Interrupting): Just a minute, please, what they suspected, I object to that as irrelevant, immaterial and incompetent.

The Witness: Well, District Attorney, when we have trouble——

(Testimony of Raoul Alfred Cosenza.)

The Court (Interrupting): Oh, just answer the question.

Q. (By Mr. Wilson): Well, did you have trouble with them?

A. Yes, I did have trouble with them.

Q. Did you call the police officers?

A. No, sir; I did not. They left.

Q. Was anything said by either of them, by Mr. Booth particularly as they were leaving to you?

A. Yes.

Q. What was said? [147]

A. He said, "I will get even with you for this," and left.

Q. When was the next time after that you ever saw George Henry Booth?

A. In the Commissioner's office in this building last June, 1950.

Q. At the preliminary hearing?

A. Yes, sir; my preliminary hearing.

Q. Mr. Cosenza, after the search of your premises on the 5th day of June, 1950, I believe, were you interviewed at the police station by the police officers respecting George Henry Booth?

A. Yes, I was, sir.

Q. What time did that take place, that conference with the police?

A. Approximately one o'clock.

Q. No, I mean, what date, was it on the 7th day of June?

A. I believe it was the 7th day of June.

(Testimony of Raoul Alfred Cosenza.)

Q. Where were you between the 5th and the 7th day of June? A. I was in Casa Grande.

Q. How were you advised that you were wanted at the police station?

A. My wife advised me when I returned from Casa Grande. [148]

Q. What did you do when so advised?

A. I went to Mr. Sorenson and asked him to go down, called and surrendered myself to the police and asked them if I am charged with something I want to know what I am charged with, and "Here I am. If you want to ask me any questions, you can ask them."

Q. Did you have a conversation in which Mr. Nichols and Officer Roberts were present?

A. They were present, yes, sir.

Q. Did you have a conversation at that time?

A. I answered some questions they asked me.

Q. That was about one o'clock in the afternoon, you say? A. Yes, sir.

Q. Can you tell us what the conversation was, or what questions were asked and what your answers were?

A. Yes, they asked me if I knew George Henry Booth. I told them, "Yes, I knew George Henry Booth," and then they went on about if I had in my possession guns, cameras, stamps, money and everything else. I said, "I didn't have in my possession any guns, cameras, or anything else." They asked me if I had in my possession any diamonds, jewelry,

(Testimony of Raoul Alfred Cosenza.)

and then I says, "No, I don't [149] have any diamonds or anything else," so then they just kept asking me questions trying to say to me to admit—I admitted nothing, I had done nothing. Mr. Sorenson was there present with me.

Q. Were you asked about the episode at Skipper's on the first of December?

A. Yes, sir. They asked me about that. I admitted seeing the jewelry and I admit it from the stand. I saw the jewelry.

Q. At the conclusion of the conference was any statement made to you by the officers as to whether or not they would want you back?

A. They said they would like to hold me because the FBI wanted to question me. We told them any time they wanted me all they had to do was to call me and I would report down to the FBI's office or anywhere else for questioning.

Q. Were you informed that they had a warrant then in their possession for your arrest?

A. I was not informed of any warrant at that time.

Q. Were you later arrested that day?

A. I was arrested at 6 o'clock that evening, that evening when I returned with Mr. Sorenson to supposedly answer questions of the FBI, and I was arrested on a state charge. [150]

Q. Have you ever engaged in any law violation or advocated or executed or induced or persuaded George Henry Booth or anyone else to burglarize any house, or to violate any law in any respect,

(Testimony of Raoul Alfred Cosenza.)

Mr. Cosenza? A. I know I have not, no.

Q. Did you receive any loot from any of the law violations or depredations of Mr. George Henry Booth? A. I have not.

Q. Have you concealed or attempted to help him conceal any loot or fruits from any of his burglaries or law violations at any time?

A. I have not, sir, I have not.

Mr. Wilson: You may cross-examine.

The Court: The court will stand at recess until 10 in the morning. Keep in mind the court's admonition.

(Thereupon a recess was taken at 4:15 o'clock p.m. of the same day.) [151]

Ten o'clock a.m., April 13th, 1951, all parties as heretofore noted by the Clerk's record, being present, the trial resumed as follows:

RAOUL A. COSENZA

resumed the witness stand and testified further as follows:

The Court: Do you want to cross-examine this witness?

Mr. Thurman: I didn't know whether he was through or not.

Mr. Wilson: We rested last night.

The Court: I thought so, too.

Cross-Examination

By Mr. Thurman:

Q. You say the only business you were in with

(Testimony of Raoul Alfred Cosenza.)

Mr. George Booth was the brokerage of liquor licenses? A. Just that one liquor license.

Q. Just that one liquor license and that was all?

A. That was the only business I had with George Booth.

Q. Then you never did transact any business with him for the purchase and sale of [152] zircons? A. No, sir.

Q. Never at any time? A. No, sir.

Q. I will ask you if it isn't a fact that George Booth would purchase those zircons in California and bring them into Arizona and you and he would sell them here in Phoenix, Arizona?

A. No, sir.

Q. Now, do you know what a zircon is?

A. No, I don't, sir.

Q. You never saw one?

A. If I seen one I don't remember.

Q. Now, when was it that Booth gave you this check he mentioned?

A. The early days of July, sir.

Q. Huh?

A. The first days of July. I don't know exactly what day it was.

Q. The first days of July, '49, correct?

A. Yes, sir.

Q. And you returned it to him in the men's restroom when?

A. At the Jefferson Cocktail Lounge approximately around December.

Q. September? A. December. [153]

(Testimony of Raoul Alfred Cosenza.)

Q. December?

A. Approximately around the 8th or 9th, sir.

Q. Approximately around the 8th or 9th?

A. '49.

Q. And that was after you had been there at Skipper Hooper's Buffet here in Phoenix, Arizona, and seen this jewelry for the first time?

A. That is right, sir.

Q. Now, what bar were you employed at at the time that Booth gave you this check?

A. The El Rancho at 24th Street and Camelback Road.

Q. And who was the owner and proprietor of that?

A. Lydel and Hazel Hiett.

Q. Who?

A. Lydel and Hazel Hiett—H-i-e-t-t.

Q. And they are husband and wife?

A. Yes.

Q. And the wife, Hazel, she had quite a bit to do with the operation of that place, did she?

A. Yes, she does.

Q. And while they were away you were operating it, weren't you?

A. No, sir; I was operating under a percentage basis like I explained to you yesterday, on a [154] percentage basis. My wife and I operated it on a percentage basis.

Q. There wasn't anybody else there but you and your wife in the operation of it at that time?

A. No, Mrs. Hiett was there. She came in, and they were there.

Q. They were there all the time?

(Testimony of Raoul Alfred Cosenza.)

A. Not all the time, no, sir. We were running it, but it was still under her supervision.

Q. Under Hazel Hiett's supervision?

A. That is right, sir.

Q. And when did you leave their employment?

A. Which particular time, sir?

Q. We will say the last time.

A. I am working for them now.

Q. You are still working for them?

A. No. That is what I am asking you, what particular time?

Q. Well, say in the month of September, '49?

A. I was not working for them then.

Q. You weren't working for them?

A. No. Under that particular percentage lease that we had, I believe, to the best of my knowledge it ended around the 15th or 18th day of July.

Q. Then you went to work for them [155] again?

A. I went to work in 1950 again for them.

Q. How long did you work then?

A. I believe I worked extra for them at Duffy's Tavern, which they owned also at Sunnyslope, and I worked off and on for them. Anytime they wanted me to do extra work, they called me.

Q. You still do that?

A. Yes, sir; I am doing that right at the El Rancho, and I started this last time two weeks before the holidays and I am supposed to be working after the holidays and I am still working.

Q. When did Booth give those stamps to your wife?

(Testimony of Raoul Alfred Cosenza.)

A. To the best of my knowledge, if I recall, it was in April, '49.

Q. And after that you only saw Booth once in every three or four months, is that correct?

A. Yes, sir; I just saw him, I just saw him once or twice.

Q. Never had any business transactions with him at all? A. No, sir.

Q. Now, on this first day of December, 1949, or about the first day of December, you went in to see Skipper that day, didn't you?

A. Yes, sir; I did. [156]

Q. And what time did you go in to see Skipper that day?

A. It must have been 12:30 or one o'clock, because Mr. Skipper didn't come down there until that time.

Q. If he wasn't there you would not have gone to see him? A. That is right, sir.

Q. You knew when Mr. Skipper gets there?

A. That is right, sir, I did a lot of work for them.

Q. You had a lot of business with Skipper?

A. That is right, sir.

Q. You are still doing business with Skipper?

A. That is right, sir.

Q. Then you came out and you found Booth there, didn't you? A. I did, sir.

Q. And you and he had a drink?

A. I had a drink. He was already having a

(Testimony of Raoul Alfred Cosenza.)

drink in the booth. I ordered a drink at the bar just like I testified yesterday.

Q. How did you and Booth get back into Skipper's office?

A. He asked me, "Is Skipper in the office?" I presumed he was sitting there, you know, to see if [157] Skipper was there, so he asked me that. I said, "Yes, he is in the office," and he says, "Well, I'd like to see him—come here, I want to show you something."

Q. And what did you do then?

A. I walked into the back office with Booth.

Q. Then what took place?

A. Booth showed the jewelry.

Q. You stayed in there while it was being shown? A. Yes, sir.

Q. And it was just accidental you were there at the same time Booth was there?

A. It was accidental, yes, because I had been coming in there every day and this particular time because of that license transaction that we had.

Q. Now, you said in your direct examination that Booth came into Skipper's office just the same as any other salesman on jewelry would approach him? A. That is right.

Q. There was nothing unusual about the way Booth handled this jewelry that he had on him?

A. It was nothing unusual about it, not the way he handled it. [158]

Q. Is that the usual thing that happens in Skipper's place when people come in with jewelry?

A. No, sir.

(Testimony of Raoul Alfred Cosenza.)

Q. Just how do they handle it?

A. That was the only time I have ever seen any jewelry in Skipper's place.

Q. And he had this jewelry in that paper bag, you say?

A. I didn't say he had it in a paper bag. I don't recall what he had it in. Now, since this has all come out in the testimony I believe it was in a paper bag.

— Q. And you think that is usual for it—the usual and customary way for a jewelry salesman to handle their jewelry?

Mr. Wilson: I object on the ground it is calling purely for a conclusion of the witness.

Mr. Thurman: That is what he said on your examination of the witness, that is what he admitted on cross, too.

The Court: All right, go ahead.

(The last question was read by the reporter.)

The Witness: I have no knowledge of jewelry salesmen, how they handle their business.

Q. (By Mr. Thurman): This jewelry, you are familiar with this jewelry that is here in this court room, [159] aren't you?

A. I recognized it yesterday, yes, sir.

Q. And you saw it there in the room?

A. I saw the three pieces I recognized there, yes, sir.

Q. Which three pieces did you recognize (handing the articles to the witness)?

A. Those three, sir. (handing articles to Mr. Thurman).

(Testimony of Raoul Alfred Cosenza.)

Q. While you were in there, Skipper left with this piece, did he not, and leave the office with it?

A. I don't remember what piece he took out, sir.

Q. Well, do you remember whether he took any piece out or not?

A. I don't even recall that, sir.

Q. Now, are you acquainted with Mrs. Lona Lane?

A. I know her just as an acquaintance.

Q. And you met her with Mr. Booth, did you not?

A. I met her at the bar with Mr. Booth, just only a bar acquaintance, that is all.

Q. You met her in several different bars during the months of April, May, June and July, [160] August and September, here in Phoenix, Arizona, did you not?

A. I did not, sir. I met her at the El Rancho in July.

Q. Only once?

A. To the best of my knowledge, yes, it was only once. There I saw her in company with Mr. Booth.

Q. Didn't she enter into conversations that you had with Booth with respect to the sale of these zircons?

A. No, sir.

Q. Now, whatever transactions you had with Booth were always handled in cash, weren't they?

A. Transactions of what kind, sir?

Q. Well, you say the only transaction you ever had was the sale of one liquor license?

(Testimony of Raoul Alfred Cosenza.)

A. That was handled through Mr. Sorenson and he was the escrow agent and he paid us out of the escrow account by check.

Q. It was given—Sorenson gave you the check or did he give it to Booth?

A. He gave us each our part that was coming to us.

Q. What is that?

A. The part that was coming to us, he gave [161]—us each individual checks out of his escrow account.

Q. Now, isn't it a fact that in the latter part of April or the early part of May, on a Sunday morning, that you called Mrs. Lona Lane on the telephone and in substance said to her, "Is George there?," to which she said, "No," and then you said to her, "Tell him that the coins are okay," and she then said, "What do mean?" and you said, "George would understand"?

A. I had never made a phone conversation of that kind to Mrs. Lane.

Q. I will ask you if it is not a fact that during the early part of September, 1949, in Phoenix, Arizona, that you again called Mrs. Lona Lane and said to her, in substance: "When will George be home?" She said, "I do not know for sure"?

A. I have never called Mrs. Lane.

Q. And isn't it a fact that here in Phoenix, Arizona, during the first part of September, '49, you went to 17th Avenue and Adams where the Industrial Commission is located here in Phoenix, Arizona, and where Mrs. Lona Lane works, and

(Testimony of Raoul Alfred Cosenza.)

that you said to her, in substance: "Do you have any of George's money?," didn't you ask her that?

A. No, sir. [162]

Q. And didn't she ask you—didn't she tell you at that time, "No," and then say, "Why?," and you said, "Because the zircons that we sold to a guy and he got wise and is screaming his head off and wants his money back," do you remember that?

A. I answered the question before. I did not make this conversation with her.

Mr. Thurman: That is all.

Mr. Wilson: That is all.

(The witness was excused.)

Mr. Wilson: Mrs. Cosenza.

DOROTHY COSENZA

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Your name, please?

A. Dorothy Cosenza.

Q. You are the wife of Mr. Raoul Cosenza, the defendant here on trial? A. Yes.

Q. And your residence is where, Mrs. Cosenza?

A. 4400 North 20th Street.

Q. Mrs. Cosenza, do you possibly know of [163] a gentleman by the name of George Booth?

A. Well, I don't know him well. I know him, I have seen him a couple of times, that is all.

(Testimony of Dorothy Cosenza.)

Q. Do you know whether or not he ever paid a visit to your home at this address during the months of March or April, '49?

A. Well, he was there about twice.

Q. Did you hear any conversation between him and your husband?

A. My husband was not home at the time he was there.

Q. Did you ever receive a present of any kind from Mr. Booth?

A. He gave me some stamps which I have collected for years and which other stamps you can send away in any magazine for 50 cents.

Mr. Thurman: I object to that, adding to a simple question. The answer could be yes or no.

Q. (By Mr. Wilson): On which of the visits that he paid there at the house did he give you the stamps?

A. The second time.

Q. On the occasion of the first visit, did you know what his business was?

A. Yes, they say—he came to see if my husband had liquor licenses to sell. [164]

Q. Did he state that to you at that time?

A. Yes, he did.

Q. Do you know whether or not he saw the stamps or the stamp collection at that time?

A. Mr. Booth?

Q. Yes.

A. Yes, he did. I had my book out there and I was putting in some stamps in the book at the time he was there.

(Testimony of Dorothy Cosenza.)

Q. Was there any discussion with Mr. Booth on the occasion of that visit respecting your stamp collection?

A. Well, he just asked me if I collected stamps and I said, "Yes."

Q. Then about how long after that was it that he made the second visit to your home?

A. Well, the best I can remember, it was about a month later.

Q. And what was the purpose of his visit then, if you know?

A. Well, he wanted to—he brought those stamps out to me and gave them to me then he wanted to know if Mr. Cosenza had this license and I told him no.

Q. Was anything else ever given to you additional to the stamps? [165]

A. No, just some stamps.

Q. Was there any coins given you?

A. No.

Q. Did you at that time collect coins?

A. I did, I had a collection of my own too that my family had given me, from my brother-in-laws and my uncles and my mother and my own brothers from overseas, foreign coins.

Q. Did you ever receive any such presents from Mr. Booth, meaning coins?

A. No, he never gave me any coins.

Q. When Mr. Booth gave you the stamps, did he make any statement at all as to the source of

(Testimony of Dorothy Cosenza.)

those stamps, where he had got them or anything about them?

A. No, he just gave them to me for my collection.

Q. Will you describe the stamps that he gave you, please, on that occasion?

A. They are stamps you can send away in these magazines, in an issue in any magazine, and pay 50 cents for one envelope marked 50 cents a hundred and another envelope a dollar a hundred or a dollar and 50, something like that, just ordinary stamps.

Q. Had you ever gotten some stamps [166] yourself?

A. Yes, sir; through the magazines. I have them pasted in my scrap book at home.

Q. Mrs. Cosenza, were you at your residence here about the 5th day of June, '49?

A. At my house?

Q. Yes.

A. No, I was working.

Q. Well, I may have the wrong date. Directing your attention to a possible visit made by a couple of police officers by the name of Mr. Nichols and Mr. Roberts? A. Yes.

Q. Did they ever come to your house?

A. Yes, they did, both of them.

Q. Was it about that time?

A. Yes, sir.

Q. Did they make a search of your house?

A. They did, they went through everything.

(Testimony of Dorothy Cosenza.)

Q. Was your husband there at the time?

A. No, he was not, my husband was out of town.

Q. Was there any conversation at all had between you and these officers?

A. Well, they asked me if I had some stamps there and I gave them the stamps and they asked me if I had some other stuff and I said, "No, [167] I have never had anything in the house," and they went through the house, they searched it completely and they took my coin collection, that was my own, and they took those stamps. I gave them the stamps.

Q. You say they did ramsack the house?

A. They certainly did, they went through everything.

Q. Do you know whether or not one of the officers held a conversation with Mr. Booth over the telephone while they were at your house in the process of this searching?

A. Yes, they did. It was Mr. Roberts, I am pretty sure——

Mr. Thurman (Interrupting): I object, the proper foundation has not been laid for any conversations.

Q. (By Mr. Wilson): During the months of June and a portion of July, where were you working?

A. At the El Rancho bar on 24th and Camelback.

Q. Was your husband working there at that time, Mrs. Cosenza? A. Yes, he was.

Q. Do you know when, or approximately when

(Testimony of Dorothy Cosenza.)

you and your husband severed your connections with the El Rancho bar? [168]

A. Well, it was in July, sometime around the 15th or something like that, I don't know exactly the date, but it was in July.

Q. Did you or your husband work at the El Rancho bar during the months of August, September, October, November or December of '49?

A. No.

—Q. Did you have any connection with that bar or around there at all after you severed your relations in the bar in the middle of July, '49?

A. No.

Q. Do you know when your husband went to work for the Jefferson Cocktail Lounge?

A. Yes, it was——

Q. (Interrupting) What month it was?

A. ——November.

Mr. Wilson: You may cross-examination.

Cross-Examination

By Mr. Thurman:

Q. Didn't your husband work periodically at the El Rancho bar after he left there in July?

A. No.

Q. Never went on for an extra shift or anything?

A. No, not at the El Rancho. [169]

Q. He has never been to work there since?

A. Yes, he is working there now.

Q. At the El Rancho?

(Testimony of Dorothy Cosenza.)

A. Yes, but he is not working there steady, he is working there extra shifts.

Mr. Thurman: That is all.

Mr. Wilson: That is all.

(The witness was excused.)

Mr. Wilson: Mr. Tony Cosenza.

MARK ANTHONY COSENZA

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Will you state your name, please?

A. My name is Mark Anthony Cosenza?

Q. You are a brother of the defendant on trial, Mr. Raoul A. Cosenza, are you?

A. Yes, sir; I am his brother.

Q. Mr. Cosenza, have you ever gone under the name of Paul? A. No, sir; no, sir. [170]

Q. How many boys are there in your family; that is, in your parents' family?

A. Just Raoul and I.

Q. The defendant on trial and you, is that right?

A. Yes, sir.

Q. Have either of you, to your knowledge, ever gone under the name of "Paul"?

A. No, sir.

Q. Are you acquainted with a detective of the

(Testimony of Mark Anthony Cosenza.)

police force of the City of Phoenix by the name of Mr. Nichols? A. No, sir.

Q. To your knowledge, have you ever seen such a gentleman at all?

A. No, sir; I have never seen him.

Q. Were you ever interviewed by any of the police officers of the City of Phoenix, or anyone else respecting any matters connected with George Henry Booth from the sale of a camera?

— A. No, sir; I have not.

Mr. Wilson: Will you have Mr. Nichols step in, please, I just want to be sure.

(Whereupon Detective Fred Nichols was called in the courtroom.) [171]

Mr. Wilson: That is the gentleman I refer to as Detective Nichols, have you ever up to this moment ever seen that man before?

A. No, sir; I never have.

Mr. Wilson: That is all, you may cross-examine.

Mr. Thurman: No cross-examination.

(The witness was excused.)

Mr. Wilson: Hazel Hiett.

HAZEL L. HIETT

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Will you state your name for the jury, please? A. Mrs. Hazel L. Hiett.

Q. Mrs. Hiett, do you and your husband own and operate the El Rancho bar?

A. Yes, sir.

Q. Out on 24th and Camelback, here in the valley? A. Yes, sir. [172]

Q. Approximately how long have you owned that bar, Mrs. Hiett?

A. Well, this last time about three years.

Q. You were the owner of the bar, then, during the months of June, July, August and September of '49, were you? A. Yes, sir.

Q. Are you acquainted with the defendant, Mr. Raoul Cosenza, now on trial?

A. Yes, sir.

Q. Do you know his wife, Mrs. Cosenza, Dorothy Cosenza? A. Yes, sir.

Q. Did you have any business relations, you and your husband, with Mr. and Mrs. Cosenza during the months of June and July, '49?

A. Yes, sir.

Q. And what were those business relations, Mrs. Hiett?

A. Well, he and his wife were bartender and waitress for us during that period of time.

(Testimony of Hazel L. Hiett.)

Q. All right. Do you know when they severed their connection with the El Rancho bar?

A. Well, at that time I would say about the middle of July, the 15th.

Q. Do you know what basis they had for [173] operating there?

A. Yes, sir; he and his wife were to receive one half of the net profit in payment for wages.

Q. Did Mr. or Mrs. Cosenza, either one, have any connections with the bar or work around there during the months of August, September, October, November of '49?

A. No, sir; I don't think so.

Q. Did you operate the bar during that time I have just named? A. Yes, sir.

Q. You would know whether they had any employment there during that time? A. Yes, sir.

Q. Mrs. Hiett, Mr. Cosenza has since that time worked extra, I believe, is that right?

A. Yes, sir; he is working there extra some now.

Mr. Wilson: You may cross-examine.

Cross-Examination

By Mr. Thurman:

Q. And during the months of June and July of '49, you were in and about the premises there at the bar, were you? A. Yes, sir. [174]

Q. At the El Rancho, I believe you call it?

A. Yes, sir.

Q. And you kept pretty good track of what went through the till, did you?

(Testimony of Hazel L. Hiatt.)

A. Well, as close as you can.

Q. Did you have occasion there to pick up a check that Mr. Cosenza had run through the cash register for \$40.00 that was returned "No account"?

A. Well, yes, sir; there was one returned.

Q. When was that?

A. Well, I don't remember exactly. It has been quite a while ago.

Q. Was there anything significant about the particular check that you have in mind?

A. Well, Mr. Cosenza eventually paid it, if that is what——

Mr. Thurman: That is all—do you know who signed the check? A. I don't believe I do.

Mr. Thurman: That is all.

(The witness was excused.)

(Thereupon the defendant left the Court room.) [175]

WOODROW S. DUKE

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Your name is what?

A. Woodrow S. Duke.

The Court: Just a minute, the defendant is not

(Testimony of Woodrow S. Duke.)

here. The trial is supposed to be had in his presence. Better go get him and tell him to stay there.

Mr. Wilson: Go get him and tell him to be here.

(Thereupon the defendant returned to the Court room.)

Q. (By Mr. Wilson): And, Mr. Duke, your business is what, please?

A. At the present time I am a salesman, sir.

Q. And what was your business during the month of December, 1950?

A. I was in the bar supply business then.

Q. And by whom were you employed?

A. Myself.

Q. At that time were you acquainted with Mr. Cosenza, the defendant here on trial? [176]

A. Yes.

Q. And how long had you been acquainted with him at that time in December of 1950?

A. Well, how many years, or——

Q. Well, yes, approximately?

A. Oh, quite a few years, I guess.

Q. Were you doing business with Mr. Cosenza during the month of December?

A. I was supplying the bar that he worked at.

Q. And where was Mr. Cosenza working during the month of December, to your knowledge?

A. The Jefferson Lounge.

Q. Are you acquainted with a man by the name of George Henry Booth? A. No, sir.

(Testimony of Woodrow S. Duke.)

Q. Or, are you acquainted with a gentleman by the name of Charley Kobus? A. No, sir.

Q. Were you present in the bar on any occasion when Mr. Cosenza had any trouble?

A. Yes.

Q. With a couple of gentlemen. About when was it, Mr. Duke, that you know of?

A. Well, as I remember, it was just a little bit before Christmas. The exact date, I don't [177] know.

Q. And was there any other people in the bar room at that time?

A. Well, there was a few other people in there, as I remember it.

Q. Did you hear any conversation between Mr. Cosenza and these two gentlemen?

A. Vaguely.

Q. Will you state to the jury what the conversation was?

Mr. Thurman: He said, "Vaguely." I object, no proper foundation laid for it.

The Court: He said these were "gentlemen." That is not a very adequate identification for some of these people.

Mr. Wilson: May we have Mr. Booth brought into the court room?

The Court: All right.

Mr. Wilson: Let me ask you while we are waiting for the arrival of Mr. Booth, Mr. Duke, do you know whether or not one of these men was a Mexican?

(Testimony of Woodrow S. Duke.)

A. Well, I don't know what his nationality was, but he was kind of dark.

(Thereupon George Henry Booth entered the court room.)

Mr. Wilson: Now, the first gentleman that [178] walked in there is the gentleman I referred to as Mr. Booth. Take a look at him, please.

(The witness complies.)

Mr. Wilson: That is all, you may go.

(Thereupon George Henry Booth left the court room.)

Q. (By Mr. Wilson): Can you identify that man as either of the men that you saw at the bar on this occasion?

A. I don't know. He looks a little familiar.

Q. Well, on that date that you fixed, at about what hour of the day was it, or of the night, that you heard this conversation?

A. It was between, about 9 or 10 o'clock at night.

Q. And at that time what was the conversation that you heard?

Mr. Flynn: Same objection.

The Court: Just a minute. Do you know whether this man you just saw was one of these people?

A. Well, he looks sort of.

Q. Well, are you positive or not?

A. No, sir; I am not positive of it.

Mr. Wilson: What is the ruling of the Court, may I ask?

The Court: Well, the objection will be [179] sustained. Bartenders have rows with a good many gentlemen.

Mr. Wilson: All right, that is all.

The Court: That will be all.

(The witness was excused.)

Mr. Wilson: Bryce Long.

(The bailiff returned to the Court and reported the absence of the witness Bryce Long.)

Mr. Wilson: Well, the witnesses were served with a subpoena and he is down looking at the parade, so I am informed by the bailiff.

The Court: Well, do you want the marshal to go get him with a bench warrant?

Mr. Wilson: No. If the court cares for recess for five minutes we probably could get him up here. Instead of sending the marshal down to get him, I don't know that the marshal is acquainted with him or not.

The Court: He probably could find him, he does a pretty good job on that. Well, we will have our morning recess at this time. Keep in mind the Court's admonition.

(Thereupon a short recess was taken, after which, all parties as heretofore noted by the clerk's record being present, the trial resumed as follows:) [180]

The Court: You may proceed.

Mr. Wilson: I understand the witness is not

available, although under subpoena, so the defendant will rest at this time with the right to call character witnesses later.

The Court: All right. [181]

In Rebuttal for the Government

Mr. Flynn: Call Mr. Hemphill.

CHARLES HEMPHILL

was called as a witness on behalf of the Government, and being first duly sworn, testified in rebuttal as follows:

Direct Examination

By Mr. Flynn:

Q. You may state your name.

A. Charles Hemphill.

Q. And what is your business or occupation?

A. Special agent, Federal Bureau of Investigation.

Q. How long have you been with the Bureau, Mr. Hemphill?

A. Ten years.

Q. You are now stationed at Phoenix, Arizona?

A. Yes, sir.

Q. I will ask you, Mr. Hemphill, if you were present at a conversation with Mr. Skipper Hooper in the FBI office in this building on or about the 7th day of June, 1950, at which you were present, two police officers, Roberts, Nichols, Mr. Booth and Mr. Connor, the other agent here, [182] and Mr. Hooper?

A. Yes, sir; that is true.

Q. I will ask you if at that time and place, Mr. Hooper stated, in substance, as follows, in reference

(Testimony of Charles Hemphill.)

to the time that the jewelry was displayed to him in his office in Phoenix by—in the presence of Mr. Booth, and referring to Mr. Booth and Mr. Cosenza, the defendant here, if he stated at that time in substance that Mr. Cosenza had the jewelry in his possession, that Mr. Booth was called into the conference after Cosenza had spread the jewelry out on his desk? A. That is true.

Q. Did Mr. Hooper make that statement?

A. Yes, sir.

Mr. Flynn: That is all.

Cross-Examination

By Mr. Wilson:

Q. Was that conference stenographically reported? A. No, sir.

Q. Don't you usually on an important matter like that have the exact language used by the witnesses?

A. Very seldom unless he is the defendant. [183]

Q. I see. Were you contemplating a charge against Mr. Hooper?

A. It is not for me to bring charges, Mr. Wilson, Mr. Flynn does that.

Q. You make a report, though? A. Yes.

Q. Do you recommend prosecution or not in these cases? A. No, sir; we do not.

Q. Then when was this matter actually reduced to writing and the language of the witness quoted?

A. I am not certain of that. Mr. Connor here could probably testify to that.

(Testimony of Charles Hemphill.)

Q. Who reduced it to writing in the report that the United States Attorney read from?

A. I don't know. Mr. Connor could tell you that.

Q. When was it reduced, do you know that?

A. I don't know. It was shortly after that.

Q. It could have been sometime after that, couldn't it, Mr. Hemphill?

A. Yes.

Q. Or longer than that?

A. Yes, sir.

Q. You were investigating a lot of gentlemen besides Mr. Hooper, were you not, in [184] connection with this matter?

A. Yes, sir.

Q. That of Mr. Funk and Mr. Don Stewart and Mr. Haddad?

A. I was not; I personally was not.

Q. But as far as we know, these words were probably quoted, maybe, as long as two weeks after the witness had actually testified at this meeting, is that right?

A. So far as I know, it could have been, yes, sir.

Q. Do you know who made the report?

A. I believe Mr. Connor did.

Q. Was Mr. Connor present at that meeting?

A. Yes, sir.

Q. But you don't know when he made it?

A. No, sir.

Q. Or you are not sure he did make it?

A. I am reasonably sure that he did.

Mr. Wilson: That is all.

(The witness was excused.)

Mr. Flynn: Call Mr. Connor. [185]

WILLIAM M. CONNOR

was called as a witness on behalf of the Government, and being first duly sworn, testified in rebuttal as follows:

Direct Examination

By Mr. Flynn:

Q. You may state your name and occupation.

A. William M. Connor, Special Agent, Federal Bureau of Investigation.

Q. You are stationed here at Phoenix?

A. Sir?

Q. You are stationed here at Phoenix?

A. Yes, sir.

Q. How long have you been with the FBI?

A. A little over ten years.

Q. I will ask you if you were present at a conversation that Mr. Hemphill testified to on the 7th of June, in the FBI office, in the presence of Mr. Hemphill, two police officers and Mr. Booth and Mr. Hooper, and I will ask you if at that time and place, in an interview, that Mr. Hooper stated, in substance, in reference to the jewelry being displayed to him in his office, that Mr. Cosenza had possession of the jewelry and that Mr. Booth was called into the conference after Cosenza had spread the jewelry out on his [186] desk. Did Mr. Hooper make that statement, in substance?

A. Yes, sir; he did.

Mr. Flynn: Cross-examine.

(Testimony of William M. Connor.)

Cross-Examination

By Mr. Wilson:

Q. Do you have the exact language?

A. That was reported in substance, sir.

Q. Oh, that is the substance of it?

A. Yes, sir.

Q. And that is the substance taken out of possibly a half hour's statements by Mr. Hooper, is that right?

A. Well, I wouldn't say a half hour's statement by Mr. Hooper.

Q. How long would you say, Mr. Witness?

A. Mr. Hooper didn't actually make a statement. It was kind of a conversation between Mr. Hooper and Mr. Hemphill.

Q. What was the rest of the conversation, then, what were the rest of the words used by the witness Mr. Hooper?

A. Mr. Hooper became very much outraged——

Q. No, what were the rest of the words, Mr. Witness, in the conversation, not what Mr. [187] Hooper became?

A. You want what Mr. Hooper said?

Q. Yes, I want to know what the rest of the conversation was. You said you had taken out just the substance of a long conversation in the sentence that was just read to you.

A. With the court's permission I could quote some of it verbatim.

The Court: Go ahead, tell him what he wants.

(Testimony of William M. Connor.)

A. Mr. Hooper said, "What the hell is the idea of calling me over to this god damn place?" He said, "I am a legitimate businessman around this town and you are treating me like a crook."

Mr. Wilson: Is that the substance of a half hour's testimony by Mr. Hooper?

A. That was the substance of the opening statement by Mr. Hooper.

Q. Go ahead.

A. He enlarged on that at considerable length, and the information that I wrote later which actually pertained to the transaction in the bar probably occupied less than five minutes of Mr. Hooper's time.

Q. And this sentence is the substance of a five minute testimony by Mr. Hooper, is that right?

A. Well, five minutes conversation. It was [188] not testimony, no, sir.

Q. At that time you had many people under investigation? A. Yes, sir.

Q. Were you making notes of what all the witnesses that you interviewed were saying at that same time? A. Yes, sir.

Q. Could you have gotten any of these statements confused with what some other witnesses told you? A. No, sir.

Q. When did you write up that report with reference to the time the statements were made?

A. That was originally written up within, I can't say exactly, you understand?

Q. Well, certainly.

(Testimony of William M. Connor.)

A. But within ten days.

Q. Ten days, you say? A. Yes, sir.

Q. Do you, in the conduct of the Federal Bureau of Investigation, do you make a practice of taking back the statement after you write it up to the witness to have him verify it and sign it?

A. This was not—no statement, as such, [189] was ever taken from Mr. Hooper.

Q. This is your report being made by the Federal Bureau of Investigation to the United States Attorney, is that right? A. Yes, sir.

Q. And purports to only give a substance of what the witness has said in a lengthy conversation with the agents? A. Yes, sir.

Q. And does the report contain any other matters that Mr. Hooper stated there in that long conversation that pertained to this case at all?

A. No, sir.

Q. Is that all that the report contains, then, with reference to Mr. Hooper, simply that he made, in substance, a certain statement?

A. Yes, sir.

Q. That is all your report contains to the United States Attorney, is that right?

A. That is not what I said. You asked if that was all that it contained with reference to the pertinent statement made by Mr. Hooper.

Q. That is right.

A. Yes, sir; that is all it contained, yes, [190] sir.

Q. And the rest of the report has to do with

(Testimony of William M. Connor.)

various other witnesses on other cases connected with Mr. Booth, is that right?

A. To the report, do you have reference to?

Q. The report that you made from which Mr. Flynn just read.

A. No, sir; it does not.

Q. Did you make other reports respecting those other matters?

A. Reports are made in all cases. Mr. Booth was a case and reports were made in Mr. Booth's case, yes, sir.

Q. Were you present in the Grand Jury room when Mr. Hooper testified?

A. No, sir.

Mr. Wilson: That is all.

(The witness was excused.)

Mr. Flynn: Call Mr. Roberts.

HARRY ROBERTS

was recalled as a witness for the Government, and testified in rebuttal, as follows: [191]

Direct Examination

By Mr. Flynn:

Q. Mr. Roberts, you were sworn and testified yesterday?

A. Yes, sir.

Q. I will ask you, Mr. Roberts, if you—you didn't testify, you were just sworn?

A. No, I didn't, I was just sworn to testify.

Q. I will ask you, Mr. Roberts, if you were present in an interview in the FBI office on or about the 7th day of June of last year?

(Testimony of Harry Roberts.)

A. I was.

Q. In which Mr. Booth was present, Mr. Hemp-hill and Mr. Connor, the Federal agents, and your other police officer, Mr. Nichols and Mr. Hooper?

A. That is correct.

Q. I will ask you if at that time and place Mr. Hooper, in your presence and hearing, and in the presence of these other men made a statement in reference to the jewelry which was shown to him in his place of business which, in substance was, as follows: that Mr. Cosenza had the jewelry in his possession and Mr. Booth was called into the conference after Cosenza had spread the jewelry out on his desk? [192]

A. That is correct.

Mr. Flynn: You may cross-examine.

Cross-Examination

By Mr. Wilson:

Q. Did you have anything to do with making of the report to the United States Attorney respecting that conversation of Mr. Hooper?

A. I beg your pardon?

Q. Did you have anything to do with making the report?

A. No.

Q. To the United States Attorney?

A. No.

Q. Did you ever see the report after it was written up?

A. No, I didn't.

Q. Do you know when it was written up?

A. No, I don't.

Q. Was there any stenographer there reporting

(Testimony of Harry Roberts.)

the exact words that Mr. Hooper employed in that lengthy conversation? A. No, sir.

Q. How long was Mr. Hooper there in front of your committee in this interview?

A. Oh, I'd say approximately a half hour. [193]

Q. And that statement is simply the substance, then, of a half hour's conversation, is that right?

A. That is what he said, yes.

Mr. Wilson: That is all.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. Thurman: Mrs. Lona Lane.

LONA LANE

was called as a witness on behalf of the Government and testified in rebuttal, as follows:

Direct Examination

By Mr. Thurman:

Q. Mrs. Lane, where do you live?

A. 433 North Oakland Avenue.

Q. During the year, '49, where did you live here in Phoenix, Arizona? A. 1553 West Madison.

Q. There is nothing mysterious about that place, is there? A. Not that I know of.

Q. Now, who lived with you there at 1553 West Madison during the year '49? [194]

A. My three children and the son of George Booth.

Q. What is George Booth's son's name?

(Testimony of Lona Lane.)

A. His name is George. We call him "Buck."

Q. You knew Mr. Booth quite a while, did you not?

A. Quite a while.

Q. During that period of time, and when did you first meet Mr. Booth, Mrs. Lane?

A. I met him in '44.

Q. In '44, and what association did you have with him, say, during the year '48?

A. Friendship.

— Q. Or '49 or '48, friendship. What about the telephone, and things of that kind?

A. He had his telephone transferred to my house.

Q. When was that?

A. Well, that was in '48 when I lived at 1640 West Madison.

Q. And then after you moved from 1640 West Madison to 1553 West Madison, did you have the telephone installed in this new residence?

A. After a few months I was able to get my own phone and then I had his disconnected and my own phone put in. [195]

Q. Then you did have a phone at all time at 1553 West Madison?

A. Yes.

Q. In your association with Mr. Booth did you become acquainted with the defendant here?

A. I did.

Q. Where did you first meet the defendant?

A. I don't know exactly where. It was in '48 when George and Mr. Cosenza were in this liquor transferring business.

(Testimony of Lona Lane.)

Q. In '48? A. Yes.

Q. And what time in '48 was it?

A. I can't say specifically when, approximately late summer.

Q. And what other business that you know of did Mr. Booth and this defendant carry on together other than these liquor licenses?

Mr. Wilson: We object to it on the grounds it is not material, improper redirect examination and not offered as rebuttal.

The Court: Go ahead, you may answer.

A. They were selling zircons.

Q. (By Mr. Thurman): Tell the court and jury what a zircon is?

A. It is a synthetic stone similar to a [196] diamond.

Q. And how were these zircons obtained?

A. Through Los Angeles.

Mr. Wilson: We object to it, if the court please, calls for a conclusion of the witness.

The Court: If she knows it is not a conclusion.

The Witness: Obtained them from firms on the Coast, Los Angeles.

Q. (By Mr. Thurman): How long did they continue this business together?

A. I'd say three or four months.

Q. Did they do any of this particular business in the year '49?

A. I think through the spring.

Q. Through the spring of '49?

A. Through the spring.

(Testimony of Lona Lane.)

Q. Now, during this period of time, Mrs. Lane, were you employed at any place?

A. With the Arizona Industrial Commission.

Q. Huh?

A. With the Arizona Industrial Commission.

Q. And you are still there, are you?

A. Yes, sir.

Q. And where is the Arizona Industrial Commission located here in Phoenix? [197]

— A. At the corner of 17th Avenue and Adams, the Capitol annex.

Q. Were you there in the year '49?

A. Yes, sir.

Q. '50? A. Yes, sir.

Q. From '48 up to '49, how many times did you have occasion to meet up with this defendant here?

A. Oh, numberless times—many times.

Q. Where did you meet with him?

A. Various bars.

Q. Who would you be with?

A. Mr. Booth.

Q. And did you and Booth and this defendant ever have any conversations about anything?

A. About the zircons.

Q. About the zircons, and do you remember that during the latter part of April or the early part of May, of '49, on a Sunday morning, that you received a call from this defendant who, at that time and in that conversation, said, in substance, "Is George there?" that you said, "No," then the defendant said, "Tell George all of the coins are

(Testimony of Lona Lane.)

okay," and that you then said, "What do you mean?" and the defendant said that [198] "George would understand."?

Mr. Wilson: To which we object, if the court please, on the ground it attempts to impeach upon the immaterial point.

The Court: She may answer, go ahead.

A. I do.

Q. (By Mr. Thurman): Isn't it a fact that during the early part of September of '49, that this defendant again called you by telephone in the early part of September, '49? A. Yes, sir.

Q. And in substance said: "When will George be home?" and your answer was, "I do not know for sure"? A. That is right.

Q. Isn't it a fact that during the first part of September, '49, while you were employed at the Industrial—the Arizona Industrial Commission on 17th Avenue and Adams Street in Phoenix, Arizona, that this defendant came to that place and in a conversation with you at that time said to you, "Have you any of George's money?" to which you said, "No," and, then, "Why"—

Mr. Wilson (Interrupting): To which we object—

Mr. Thurman (Continuing): —and the defendant [199] then said, "Because the fellow that bought the zircon is crying his head off, he wants his money back"?

Mr. Wilson: To which we object, attempting to impeach upon an immaterial point.

(Testimony of Lona Lane.)

The Court: Oh, she may answer.

A. That is right.

Mr. Thurman: Do you know of your own knowledge how they handled the sale of these zircons?

Mr. Wilson: We object on the ground it is not material in this case.

The Court: Go ahead.

A. They sold them for diamonds.

Mr. Thurman: Huh?

A. They sold them for diamonds.

Mr. Thurman: That is all.

A. Passed them as diamonds.

The Court: Your witness.

Cross-Examination

By Mr. Wilson:

Q. You say that Mr. Booth had his telephone transferred to your residence?

A. That is right.

Q. Did Mr. Booth take up his residence at that same place? [200] A. He did not.

Q. Did he keep any of his personal effects at your residence, Mrs. Lane? A. He did not.

Q. You say you have three children of your own?

A. That is right.

Q. And you were taking care of one of Mr. Booth's?

A. After I moved over at 1553 West Madison.

Q. And you were working every day yourself?

A. That is right.

Q. How did you take care of those children?

(Testimony of Lona Lane.)

Mr. Thurman: I object as irrelevant, immaterial and incompetent, she is not up here for——

The Court: Yes.

Q. (By Mr. Wilson): You were quite well acquainted, then, were you, with Mr. Booth's activities? A. Yes, sir.

Q. Respecting the zircons which he would buy on the Coast, is that right? A. That is right.

Q. I understand from your direct examination. Were you ever present when he ever bought any?

A. I ordered them for him and they came to my house by mail. [201]

Q. I understand that you knew that they were to be offered here by him as real diamonds, is that what I understand from your direct examination?

A. That is right.

Q. You were assisting him in that fraud, were you? A. I didn't assist him.

Q. Did you know of Mr. Booth's other activities while you were associated with him?

A. That is all the other activities he had at that time.

Q. Just the sale of that liquor license at that time with Mr. Cosenza and then the matter of these zircons, is that right, that is all you ever knew of?

A. That is right.

Q. Are you here to testify that that is the only activities of any kind that he had?

A. So far as I knew.

Q. You, from your direct examination, I understand that you went out with Mr. Booth frequently

(Testimony of Lona Lane.)

and attended various bars, is that right, Mrs. Lane?

A. That is right.

Q. And in the course of those occasions you met Mr. Cosenza? [202]

A. Well, he was working in a couple of bars. We visited him at both of those places.

Q. That was in '48 or '49? A. '49.

Q. Beg pardon? A. '49.

Q. And were those visits to Mr. Cosenza approximately every month or every week?

A. Oh, by the week, it might be every two or three nights or it might not be.

Q. Did these visits to the bars where Mr. Cosenza was working, did they occur every month throughout the year '49? A. No, sir.

Q. Did you know of any nocturnal activities on the part of Mr. Booth about that time in which he would burglarize houses while associated with you?

A. When was this?

Q. In '49.

Mr. Thurman: Just a minute, I object to the form of the question—"burglarizing houses while he was associated with the witness." There is no evidence that he ever took this witness with him.

Mr. Wilson: I am not trying to say that he [203] took the witness, during her association, during the year '49.

The Court: Did you know of any burglaries committed during that period?

A. I had of them, yes.

(Testimony of Lona Lane.)

Q. (By Mr. Wilson): Were those burglaries over in Oklahoma or in Texas, or east?

A. Yes, sir.

Q. What ones at that time did you know he committed here, locally? A. No specific ones.

Q. Did you know that Mr. Booth was going to Oklahoma, going to commit burglaries?

A. Not when he went there I didn't know.

Q. When he returned did you see the jewelry?

A. I did.

Q. That was about the first of December or the last of November, the first of December when he returned? A. That is right.

Q. And he left when?

A. I don't think he left until around January sometime.

Q. No, I mean, when did he leave on that trip from which he returned on the first of December?

A. The end of August or the first of [204] September.

Q. He went on that trip and then you again saw him when he returned about the last part of November or the first of December, is that right?

A. Yes.

Q. You didn't see him between those times at all? A. That is right.

Q. Were you working every day during that period of time here in Phoenix? A. Yes, sir.

Q. Directing your attention to the month of October, are you sure in the latter part of October you didn't see Mr. Booth in this town?

(Testimony of Lona Lane.)

A. He came back—he made so many trips it is difficult for me to be specific about the times. I can't say that he didn't return once or twice during that period.

Q. But did you see him?

A. If he was here in town I saw him.

Q. Was he here in town?

A. I can't remember whether he was in town that time or not. As I say, he made various trips.

— Q. When did you first see any of the jewelry?

Mr. Thurman: I object, it is irrelevant, incompetent and immaterial as far as this witness' [205] testimony is concerned, your Honor. She said she seen it. I don't think it makes any difference.

The Court: If she remembers she can answer.

The Witness: I can't remember whether it was the first of December, or if he came back down those times.

Q. (By Mr. Wilson): You can't remember those dates, is that right? A. No.

Q. Nor the approximate time?

A. I can't say when it was.

Q. Where did you see them, in your home?

A. No, in his car.

Q. And you continued to associate with Mr. Booth after that time, is that right?

A. I did.

Q. Did you receive as a gift from Mr. Booth any of that jewelry? A. No, I did not.

Q. Did you attempt to assist him in disposing of any of this jewelry? A. I did not.

(Testimony of Lona Lane.)

Q. Did you disclose to any peace officer or anybody about that jewelry and where Mr. Booth got it?

A. I did not. [206]

Q. Mr. Booth was arrested sometime in the year '50, wasn't he, up at Reno, Nevada?

A. He was.

Q. Were you arrested at the same time, Mrs. Lane? A. I was not.

Mr. Thurman: I object as improper cross-examination, your Honor. I don't see the materiality of it.

The Court: The witness answered. I don't either.

Q. (By Mr. Wilson): Were you confined in jail for any period of time? A. I was not.

Q. Have you been offered any immunity by any of the officers for your testimony here?

A. I have not.

Q. To your knowledge, has any complaint ever been filed against you charging you with a criminal offense? A. No, sir.

Q. Did Mr. Booth keep any of that jewelry at your home? A. Not with my knowledge.

Q. He was there every day, was he not?

A. In and out. [207]

Q. After he returned from this trip about the first of December? A. Yes, sir.

Q. Did he take meals with you there at the home? A. No, sir.

Q. Where was he living, do you know?

A. No specific place. He just stayed in various motels or hotels.

Q. Now, can you be a little more exact on the

(Testimony of Lona Lane.)

dates of these purported conversations that you had with the defendant, Mr. Cosenza?

A. You mean a definite day?

Q. Yes.

The Court: If you can't, why say so.

A. I can't.

The Court: You can't do that, I am certain, no one else can.

Q. (By Mr. Wilson): Could you place the month that any of these conversations happened?

A. It was either September or October, '49, that he came to the office to see me.

Q. September or October, a period of 60 days, there, but you don't know when?

A. No, that is right.

Q. And who was present when you talked [208] to Mr. Cosenza?

A. No one was present.

Q. He walked right up into that public office there at the Industrial Commission, is that right?

A. We have a counter where applicants come and are interviewed and he came there and called for me and spoke to him.

Q. And the telephone conversations took place at your home, is that right?

A. That is right.

Q. Was the number registered in your name or that of George Booth at the time?

A. The first one was under George's name.

Q. You had your first one, I believe you said, in April, '49?

A. Sir?

(Testimony of Lona Lane.)

Q. You had your first telephone conversation in April, is that right?

A. April or the first of May.

Q. And that had to do with what?

A. It was a telephone message he left for George.

Q. And during all of that time that these telephone conversations were coming in you and Mr. Booth were seeing Mr. Cosenza around these [209] bars nearly every day, is that right, Mrs. Lane?

A. Most of the phone calls would be while George was away. He was away lots of that time.

Q. He was not away in April, was he?

A. A part of the time, probably.

Q. Probably, you say?

A. I can't be specific.

Q. But you do know that it was in September that he left here to go to Oklahoma to commit this series of burglaries, do you?

A. I know it was the end of August that he bought a car. He was without a car at that time and he bought this car to travel around in.

Q. So that he was gone during the month of September, was he? A. Yes, sir.

Mr. Wilson: That is all.

Mr. Thurman: You may be excused, and thank you.

(The witness was excused.)

Mr. Thurman: Mr. Fred Nichols.

FRED NICHOLS

was recalled as a witness for the Government and testified in rebuttal as follows: [210]

Direct Examination

By Mr. Thurman:

Q. Mr. Nichols, you were a witness in this case for the Government yesterday, were you not?

A. Yes, sir; I was.

Q. And since you have been excused from the witness stand have you refreshed your memory as to the testimony—as to a part of the testimony that you gave while you were on the witness stand before?

A. Yes, sir; I did.

Q. And it is your desire to correct one statement that you made at that time?

A. That is correct.

Q. Due to the fact you were in error?

A. That is right, I was.

Q. Will you please tell the court and jury the correction you wish to make.

A. When I stated yesterday that the defendant's brother Paul had told us in regards to the camera which was tried to be sold to him for \$75.00. In relation to Paul telling us, it was Booth that told us that, that he said the defendant tried to sell it for \$75.00.

Mr. Wilson: We object, if the court please, on the ground that *it hearsay* evidence entirely [211] and we move that it be stricken and the jury instructed to disregard it.

The Court: Well, that is a part of what Booth

(Testimony of Fred Nichols.)

said. The officer's correction may stand, certainly, otherwise he might be indicted for perjury.

Mr. Thurman: When did you discover your error, Mr. Nichols?

A. After I left here I went down and read up on the report to see if I was correct, which I was wrong when I said it was Paul that we contacted and made the remark they tried to sell it to him for \$75.00. Instead of that, it was Booth that told us that.

Q. You brought that message to Mr. Flynn and myself?

A. Yes, I told you that early this morning.

Mr. Wilson: We object to that——

Mr. Thurman (Interrupting): I think he has a right to show the picture on anything of that kind. You may cross-examine.

Cross-Examination

By Mr. Wilson:

Q. As a matter of fact, Mr. Nichols, Mr. Connor of the FBI told you yesterday that you were [212] mistaken on that, didn't he?

A. He did not, no.

Q. Did you discuss it with the FBI agent yesterday afternoon after this court recessed?

A. I did not.

Q. Did you have any discussion at all respecting the evidence in this case with Mr. Connor?

A. I did not.

Mr. Thurman: I don't see the materiality of it, your Honor. He has made the correction, that is as

(Testimony of Fred Nichols.)

far as he can go, regardless who called it to his attention.

The Court: All right, all right, just calm down.

Mr. Wilson: That is all.

The Court: That is all.

(The witness was excused.)

The Court: Call your next witness.

Mr. Thurman: That is all, your Honor.

— The Court: We will have the arguments after lunch.

Mr. Thurman: I understand they have some more witnesses.

The Court: Who?

Mr. Thurman: The defense. [213]

Mr. Wilson: Well, we want to call our character witnesses at 2 o'clock.

The Court: All right, we will stand at recess until 2. Keep in mind the court's admonition.

(Thereupon a recess was taken at 11:45 o'clock a.m. of the same day.)

(2 o'clock p.m. after recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

R. O. BARRETT

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Will you state your name for the jury's in-

(Testimony of R. O. Barrett.)

formation, please? A. R. O. Barrett.

Q. Mr. Barrett, you are a resident, are you, of Phoenix, Arizona? A. Yes, sir.

Q. And you have resided here for how long?

A. Well, in Phoenix since '34; in the state, [214] since 1919.

Q. And throughout those years your business has been what?

A. Well, I was with the Federal Government—with the Federal Housing Administration as director for 12 or 13 years and then I have been in the mortgage business since.

Q. Here locally in Phoenix, Arizona?

A. Yes.

Q. What is the name of your company?

A. The Allied Building Credits.

Q. And you are the head of that company, are you, now?

A. Well, locally, I am the state manager.

Q. That is what I mean, and, Mr. Barrett, are you acquainted with the defendant on trial, Mr. Raoul Cosenza? A. Yes, I am.

Q. How long, approximately, have you known Mr. Raoul Cosenza? A. About four years.

Mr. Thurman: You say four or forty, pardon me?

A. Four.

Q. (By Mr. Wilson): How did you first become acquainted with him? [215]

A. He is one of our borrowers.

Q. He has a loan on his home, has he?

A. He does.

(Testimony of R. O. Barrett.)

Q. What is the ordinary custom of your company when an application is made for a loan as to whether or not the applicant is investigated?

Mr. Thurman: I object, it is irrelevant, incompetent and immaterial. If he is a character witness there is one way to go about it and not that way. I object to it.

The Court: All right.

Mr. Wilson: Did you sustain it?

—The Court: Certainly I sustained it.

Mr. Wilson: I could not hear it, your Honor.

The Court: Well, you know better than that.

Q. (By Mr. Wilson): Is that acquaintanceship an intimate one with Mr. Cosenza?

A. Oh, I'd say no, not intimate. I'd say casual.

Q. How often would you see him?

A. Oh, probably once a month.

Q. And have you and Mr. Cosenza mutual friends or acquaintances there?

A. Do I know anybody that he knows, or something?

Q. Yes. [216]

A. I presume I do, but I wouldn't know who they are.

Q. Well, by reason of that contact that you had with Mr. Cosenza and the relationship that exists between you for the past four years, do you know the general reputation which Mr. Cosenza bore on or about the first day of December, 1949, for honesty and personal integrity?

(Testimony of R. O. Barrett.)

Mr. Thurman: I object to it, the proper foundation has not been laid.

The Court: Go ahead and answer it.

A. Yes.

Mr. Wilson: And is that reputation good or bad?

A. Good.

Mr. Wilson: Cross-examine.

Cross-Examination

By Mr. Thurman:

Q. You say you don't know any people he knows or not? A. I don't know as I do, Judge.

Q. Do you know where he lives?

A. Oh, yes, we have a mortgage on the house.

Q. That is how you know where he lives is because you got a mortgage on the house? [217]

A. Oh, yes, I know the house very well.

Q. That is the reason you know where he lives because you have a mortgage on it? A. Yes.

Q. You never visited him and his family, did you.

A. Yes, I did one day. I stopped in there just before Christmas when I was in the neighborhood and said "Hello" to him and met the family for the first time.

Q. Did you ever play cards with the family?

A. No.

Q. Have you gone to dances with them?

A. No.

Q. Did you attend any social function with them

(Testimony of R. O. Barrett.)

in that particular neighborhood? A. No, sir.

Q. All you know about this man is your business relationship with him, isn't that true?

A. That is true.

Mr. Thurman: That is all.

Redirect Examination

By Mr. Wilson:

— Q. Have you ever heard his honesty or personal integrity challenged by anyone? [218]

A. No.

Mr. Thurman: I object, he has already answered that his reputation was good.

The Court: He said he never heard it discussed. You never have heard it discussed?

A. No.

Mr. Wilson: That is all.

Mr. Thurman: No further questions.

(The witness was excused.)

Mr. Wilson: Mr. Harry L. Nace.

HARRY L. NACE

was called as a witness on behalf of the defendant, and being first duly sworn testified as follows:

Direct Examination

By Mr. Wilson:

Q. Your name is Harry L. Nace?

A. That is right.

Q. And, Mr. Nace, your business is what?

(Testimony of Harry L. Nace.)

A. Operating theaters.

Q. And you are a resident of Maricopa County, Arizona?

A. Yes, sir.

Q. And of Phoenix, particularly?

A. Yes, sir. [219]

Q. How long have you been a resident of this community?

A. Oh, better than 40 years.

Q. Are you acquainted with the defendant on trial, Mr. Raoul Cosenza?

A. Yes, I am.

Q. How long have you known Mr. Raoul Cosenza?

A. Well, since he was a school kid.

Q. And is that acquaintanceship an intimate one with him.

A. Well, it was more so through my son. They were quite pals.

Q. Did they visit back and forth at your residence?

A. Yes, quite a lot.

Q. Do you know whether you and Mr. Cosenza have mutual friends or acquaintances?

A. Oh, I think we do.

Q. And, Mr. Cosenza has lived in this community, has he, since you have known him?

A. Yes. I knew his mother and his family.

Q. You knew them, did you, intimately?

A. That is right.

Q. And do you know the general reputation which Mr. Cosenza bore on or about the first day of December, 1949, for honesty and personal [220] integrity, you know what his reputation was?

(Testimony of Harry L. Nace.)

A. Well, I have never heard anything adverse to what I have known him.

Q. Then you know what his reputation was as of that time, is that right?

A. I would say so.

Q. Is it good or bad?

A. I would say it would be good.

Mr. Wilson: You may cross-examine.

Cross-Examination

By Mr. Thurman:

Q. Mr. Nace, I assume the son you mentioned is Harry Nace? A. That is right.

Q. He has some official position with the Phoenix Senators, is that right?

A. That is right.

Q. Now, does this man and your son, does he come and visit your house now?

A. No, he does not.

Q. That was when they were school children, is that right?

A. Well, occasionally I have seen them together since then, and——

Q. (Interrupting): Now, you just answer [221] my question. They don't visit back and forth like they used to when they were school children?

A. I couldn't say that, because I don't know.

Q. In other words, they have their respective homes and they don't come to your home any more, isn't that right?

(Testimony of Harry L. Nace.)

A. Well, I haven't had a home, because I am a bachelor.

Q. Wherever you do stay they don't visit there back and forth any more?

A. Well, I really couldn't say anything about that, for the reason that Harry has his office in the front and I have mine in the back, I don't know who comes in and goes out.

Q. During the period of time when the defendant here and your son visited, as I understood, at your home here in Phoenix——

A. Oh, yes, a lot.

Q. How many years ago was that?

A. Well, that is quite a few years ago, I'd say.

Mr. Thurman: Thank you, that is all.

Mr. Wilson: That is all Mr. Nace.

(The witness was excused.)

Mr. Wilson: Mr. Beauchamp. [222]

EDWARD BEAUCHAMP

was called as a witness on behalf of the defendant, and being first duly sworn testified as follows:

Direct Examination

By Mr. Wilson:

Q. Your name, please?

A. Edward Beauchamp.

Q. You are a resident of Phoenix, Arizona?

A. I am.

Q. And you are a practicing attorney at this time, is that right? A. Yes.

(Testimony of Edward Beauchamp.)

Q. Have you ever occupied any official position in Maricopa County or the State of Arizona?

A. Yes.

Q. And what was that?

A. Deputy County Attorney, County Attorney and Judge of the Superior Court.

Q. And that covered a period of how many years? A. Seven years.

Q. And how recently has it been since you severed your connection in any official capacity?

A. Approximately two years. [223]

Q. And how long have you resided in the City of Phoenix, Arizona, approximately?

A. Well, in the County 30 years; Phoenix, since 1925.

Q. And are you acquainted with the defendant on trial, Mr. Cosenza? A. I am.

Q. How long have you been acquainted with Mr. Cosenza?

A. Oh, from the time we were kids; approximately 20 years, I would say.

Q. And throughout that period of time has your acquaintanceship with him been an intimate one, more or less?

A. No, not since high school. The last 15 years I did see him occasionally, but that is about all.

Q. Do you know, or let me ask you first whether or not Mr. Cosenza has lived in this community during the period of that acquaintanceship, to your knowledge?

A. Yes, he may have been gone a few years, or

(Testimony of Edward Beauchamp.)

something like that, I wouldn't know that, but generally speaking, he has been here during that period of time.

Q. You have seen him repeatedly during those years? [224] A. I have.

Q. Do you know whether you and he have any mutual acquaintances, if any?

A. Well, I know we know lots of the same people.

Q. Well, do you know what the general reputation that Mr. Cosenza bore on or about the first day of December, 1949, is, for honesty and personal integrity in this community?

A. In a negative way, yes.

Q. And is it good or bad? A. Good.

Mr. Wilson: You may cross-examine.

Cross-Examination

By Mr. Thurman:

Q. You say "in a negative way"?

A. Yes.

Q. Do you know where he lives? A. No.

Mr. Thurman: That is all.

(The witness was excused.)

Mr. Wilson: We will rest.

Mr. Thurman: We have nothing further for the Government, your Honor. [225]

The Court: All right, you may proceed with your argument.

Mr. Wilson: Just a minute, may we have the record show at this time—I don't know whether the court will want me to state this in the record in the presence of the jury or not, at the conclusion of the evidence.

The Court: You didn't make any at the Government's case.

Mr. Wilson: Well, I assumed that at the close of all of the evidence——

The Court: Well, go ahead.

— Mr. Wilson: Very well. The defendant moves for judgment of acquittal on Count 1 of the Indictment, on the grounds that the evidence is not sufficient to justify a verdict of guilty against the defendant, and on Count 2 of the Indictment, the defendant moves to dismiss such count in the indictment on the ground that it fails to charge an offense against the laws of the United States, and for judgment of acquittal on the second count on the ground that the evidence is not sufficient to justify a verdict of guilty against the defendant.

The Court: The motions are denied.

Mr. Wilson: All right. [226]

(Thereupon closing arguments were presented to the jury by counsel for both sides, after which a recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

The Court instructed the jury, as follows:

The Court: It now becomes the Court's duty to

instruct you as to the law that applies to this case.

The first count of the indictment was read to you when you were examined on your voir dire and I will refer to it again.

It recites that on or about the 1st day of December, 1949, in the City of Phoenix, State and District of Arizona, the defendant did unlawfully and feloniously, at one time, receive from one George Henry Booth and conceal certain stolen jewelry, to wit, two diamond-studded watches, and so forth, all being of the approximate value of \$25,000.00, said jewelry having theretofore been stolen in Oklahoma City, State of Oklahoma, and transported in interstate commerce from the said Oklahoma City, Oklahoma, to Phoenix, Arizona, and the said defendant, Raoul A. Cosenza, then and there well [227] knowing that said jewelry had been stolen as aforesaid and was then and there in interstate commerce.

Now, the statute under which that first count is drawn reads, as follows:

“Whoever receives or conceals any goods, wares, merchandise or the value of \$5,000.00, or more, moving as, or which are a part of, or which constitute interstate commerce, knowing the same to have been stolen, shall be punished as the act provides”.

Count 2 is in this language: It recites that on or about the 1st day of October, 1949, in the State and District of Arizona, one George Henry Booth actually committed a crime in violation of Title 18, U.S.C.A., 2314. I will read you Section 2314. Under

this section I just read, 2315, that has to do with anyone who receives or conceals stolen property which is in interstate commerce.

Now, 2314, which is referred to in Count 2, reads, as follows:

“Whoever transports in interstate commerce any goods, wares, or merchandise of the value of \$5,000.00 or more, knowing the same to have been stolen, shall be punished as the act provides.”

Now, this Count 2 charges that George Henry Booth [228] committed an offense under this section I have just read, in that he transported this jewelry in interstate commerce, and that felony was cognizable by a court of the United States—well, that is a fact, it was—and that said George Henry Booth did, on or about the first day of October, 1949, transport and cause to be transported in interstate commerce, at one time, this jewelry in question, all being of the approximate value of \$25,000.00, from Oklahoma City, State of Oklahoma, to the City of Phoenix, State and District of Arizona, and that the said George Henry Booth then knew the said jewelry to have been theretofore stolen as aforesaid, and that Raoul A. Cosenza, the defendant herein, having actual knowledge of the commission of said felony; that is, the transportation of this jewelry by Booth, did, on or about the first day of December, 1949, in the State and District of Arizona, unlawfully and feloniously conceal the commission of said Federal offense and did not, as soon thereafter as possible, in said State and District, make known

the same to a judge or other person in civil or military authority under the United States of America.

Now, this second count is drawn under another section of [229] the code, which reads, as follows:

“Whoever having knowledge of the actual commission of a felony cognizable by a court of the United States conceals and does not, as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined and punished as the act provides.”

“Interstate commerce” as defined by the Federal statute includes commerce between one state, territory, possession or the District of Columbia, and another state, territory or possession or the District of Columbia.

By Count 1 of the indictment, the defendant is accused of having unlawfully and feloniously received and concealed certain stolen jewelry, knowing that said jewelry had been stolen and was then and there in interstate commerce.

The word “receive” as used in the statutes, means to accept, and to “accept” or “possess” means to have control, care and management and not a passing control, fleeting and shadowy in its nature, and before a person may be convicted of the crime of receiving or concealing stolen property, it must be established beyond a reasonable doubt, not only that such person knew [230] that such property was stolen and transported in interstate commerce, but that he did receive and conceal it within the meaning of those words which I just defined to you.

A mere passing, control or a brief, fleeting and shadowy possession of stolen property is not sufficient to justify a verdict of guilty, and unless you are satisfied beyond a reasonable doubt that the defendant in this case received and concealed the stolen jewelry in question, knowing it to have been stolen and transported in interstate commerce, within the meaning of the words of receiving and concealing as I have defined them to you, then your verdict must be not guilty.

—By Count 2 of the indictment, the defendant is accused of having actual knowledge of the transportation in interstate commerce of stolen property by the witness, George Henry Booth, and with concealing such fact and failing to disclose it to any judge of the United States or other person in civil or military authority under the United States of America. Mere silence upon the part of any person having knowledge of the commission of an offense under the laws of the United States is not sufficient to justify a conviction of such person; there must be some [231] affirmative act committed by such person toward the concealment of the felony, of which he has knowledge, to constitute the crime of misprision. So, in this case, unless you find, beyond a reasonable doubt, that the defendant not only had knowledge that the stolen jewelry in question was transported in interstate commerce, in violation of the laws of the United States, but also committed some affirmative act or took some step to conceal his knowledge of such violation from any judge or other person in civil or military authority of the United States, your verdict must be not guilty.

Where a defendant has offered evidence of good general reputation for truth and veracity or honesty and integrity, or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case. Evidence of a defendant's reputation, as to those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt; since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.

Now, by the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any [232] connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be [233] shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such a feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives, or by contradictory evidence. In judging the [234] credibility of the witnesses in this case, you may believe the whole or any

part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, and the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to [235] consider all the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable persons.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

Jurors are expected to agree upon a verdict [236] where they can conscientiously do so. You are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the judge as to the guilt or innocence of a defendant, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury. For, to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

Now, after you retire to your jury room you will

select one of your number to act as foreman and proceed with your deliberations. After you have agreed upon a verdict, in the event you do so agree, you will have the verdict signed by your foreman and returned into open court. Any verdict agreed upon must be the unanimous verdict of the jury.

A form has been prepared for your [237] guidance which reads, in part:

“We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find the defendant Raoul A. Cosenza blank as charged in Count 1 of the indictment; blank as charged in Count 2 of the indictment,” and in those blanks you will insert whatever your finding may be, either “guilty” or “not guilty,” and the guilt or innocence of the defendant as to each count must be determined separately.

You may retire now in the custody of the bailiff.

(Thereupon the jury retired from the court room at 4 o'clock p.m. of the same day to proceed with their deliberations.) [238]

I Hereby Certify that the proceedings had and evidence given upon the trial of this cause is contained fully and accurately in the shorthand notes taken by me of said trial, and that the foregoing 238 typewritten pages contain a full, true and accurate transcript of the same.

/s/ LOUIS L. BILLAR,

Official Shorthand Reporter.

[Endorsed]: Filed June 30, 1951. [239]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Raoul A. Cosenza, Defendant, numbered C-9426 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, constitute the record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto (excepting Government's exhibits 1-A, 1-B, 1-C, 1-D and 1-E which consist of jewelry), and the same are as follows, to wit:

1. Indictment, filed December 15, 1950.
2. Minute entry of January 8, 1951.

3. Minute entry of April 12, 1951.
4. Minute entry of April 13, 1951.
5. Verdict, filed April 13, 1951.
6. Minute entry of April 23, 1951.
7. Judgment and commitment, filed and docketed April 23, 1951.
8. Defendant's Notice of Appeal, filed April 27, 1951.
9. Defendant's Election not to Commence Serving Sentence, filed May 15, 1951.
10. Minute entry of May 28, 1951.
11. Minute entry of May 29, 1951.
12. Minute entry of June 1, 1951.
13. Order of Court of Appeals admitting defendant to bail pending appeal, filed June 25, 1951.
14. Defendant's Statement of Points on which Appellant Intends to Rely on Appeal, filed June 28, 1951.
15. Defendant's Designation of Record on Appeal, filed June 28, 1951.
16. Reporter's Transcript of Evidence, filed June 30, 1951.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$4.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 3rd day of July, 1951.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 13004. United States Court of Appeals for the Ninth Circuit. Raoul A. Cosenza, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed July 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 13004

RAOUL A. COSENZA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY TO BE
PRINTED ON APPEAL

To: The Clerk of the Above-Entitled Court, the
United States of America, and the United
States Attorney, Attorney for Appellee:

The appellant, Raoul A. Cosenza, hereby designates the following Statement of Points on which he intends to rely to be printed on appeal, to wit:

1.

The Indictment did not charge an offense against the United States in either count.

2.

There was no substantial evidence to support a verdict of guilty. The Court erred in denying appellant's motion for judgment of acquittal on both counts made at the close of the entire case.

3.

A fatal variance between the Indictment and the proof offered.

4.

The Court erred in allowing Government exhibits to be introduced into evidence over timely objection by the appellant.

5.

The Court erred in permitting the Government witness Lona Lane to testify concerning zircons over timely objection by the appellant.

6.

The Court erred in not setting a standard for evaluation of the jewelry.

7.

The Court erred when charging the jury on Count 2 of the Indictment wherein the Court voluntarily and extemporaneously remarked, "well, that is a fact, it was".

8.

The Court erred in not instructing the jury as to the evaluation to be given to the testimony of a convicted felon.

Dated this 3rd day of July, 1951.

/s/ IRA J. BERGMAN,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 5, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

To: The Clerk of the Above-Entitled Court, the
United States of America, and the United
States Attorney, Attorney for Appellee:

The appellant, Raoul A. Cosenza, hereby designates the following portions of the records and proceedings of evidence to be printed on appeal, to wit:

1. The Indictment.
2. The Verdict.
3. Judgment.
4. Reporter's Transcript of Evidence.
5. The following Minute Entries:

Minute Entry of Monday, January 8, 1951.

Minute Entry of Thursday, April 12, 1951.

Minute Entry of Friday, April 13, 1951.

Minute Entry of Monday, April 23, 1951.

Minute Entry of Monday, May 28, 1951 (that portion pertaining to Motion for Order Fixing Bail Pending Appeal and Motion for 60-Day Extension).

Minute Entry of Tuesday, May 29, 1951.

Minute Entry of Friday, June 1, 1951 (that portion pertaining to Motion for Order Fixing Bail Pending Appeal).

6. Notice of Appeal.
7. Election not to Commence Serving Sentence.
8. Order Granting Motion for Admission to Bail Pending Appeal.

9. Statements of Points upon which Appellant
Intends to Rely on Appeal.

10. This Designation.

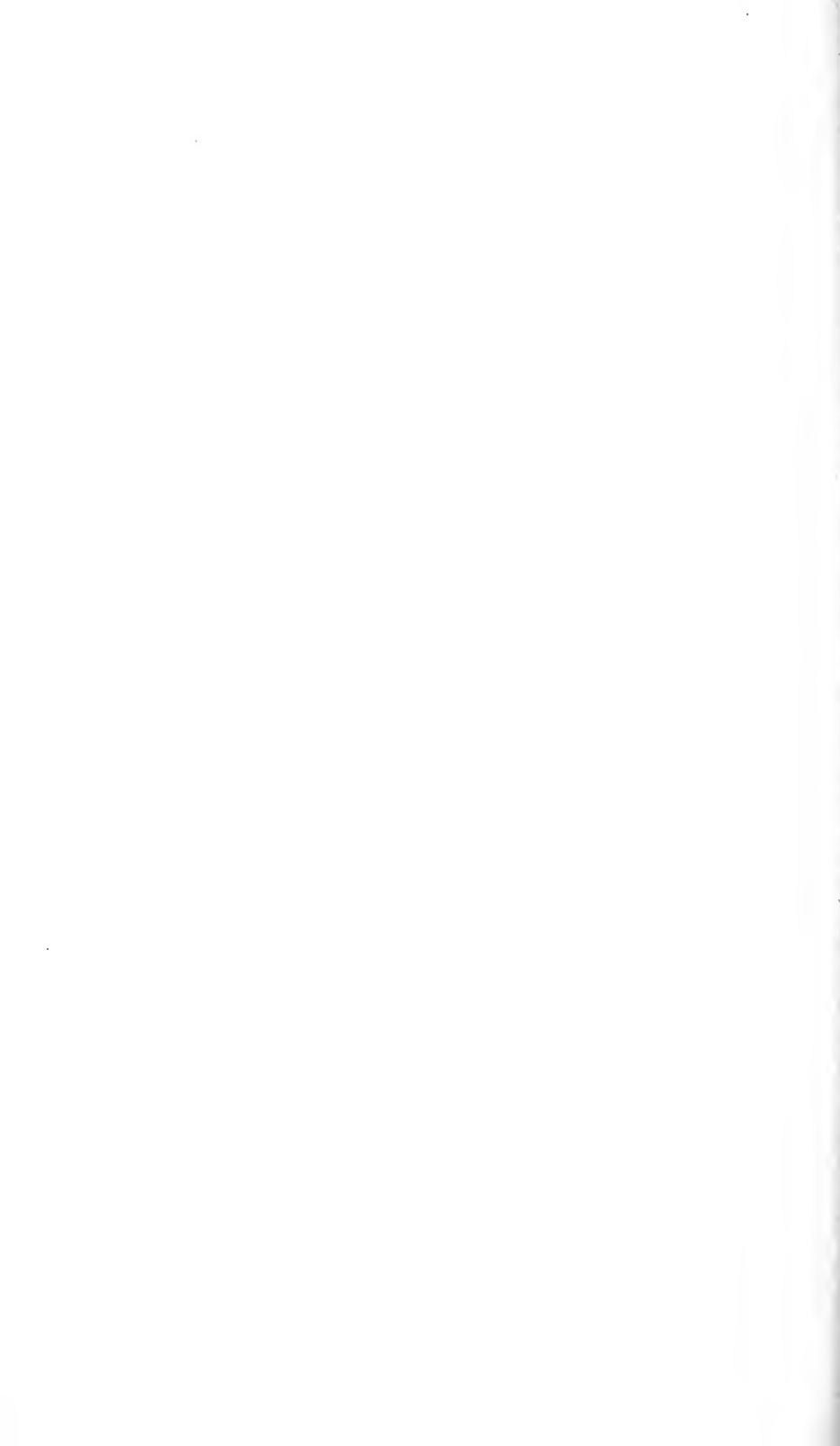
11. Certificate of Clerk.

Dated this 3rd day of July, 1951.

/s/ IRA J. BERGMAN,
Attorney for Appellant.

Receipt of Copy acknowledged.

__ [Endorsed]: Filed July 5, 1951.



No. 13005

United States
Court of Appeals
For the Ninth Circuit.

MINER LII and ALICE LII,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Hawaii.

FILED

SEP 6 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK



No. 13005

United States
Court of Appeals
For the Ninth Circuit.

MINER LII and ALICE LII,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Hawaii.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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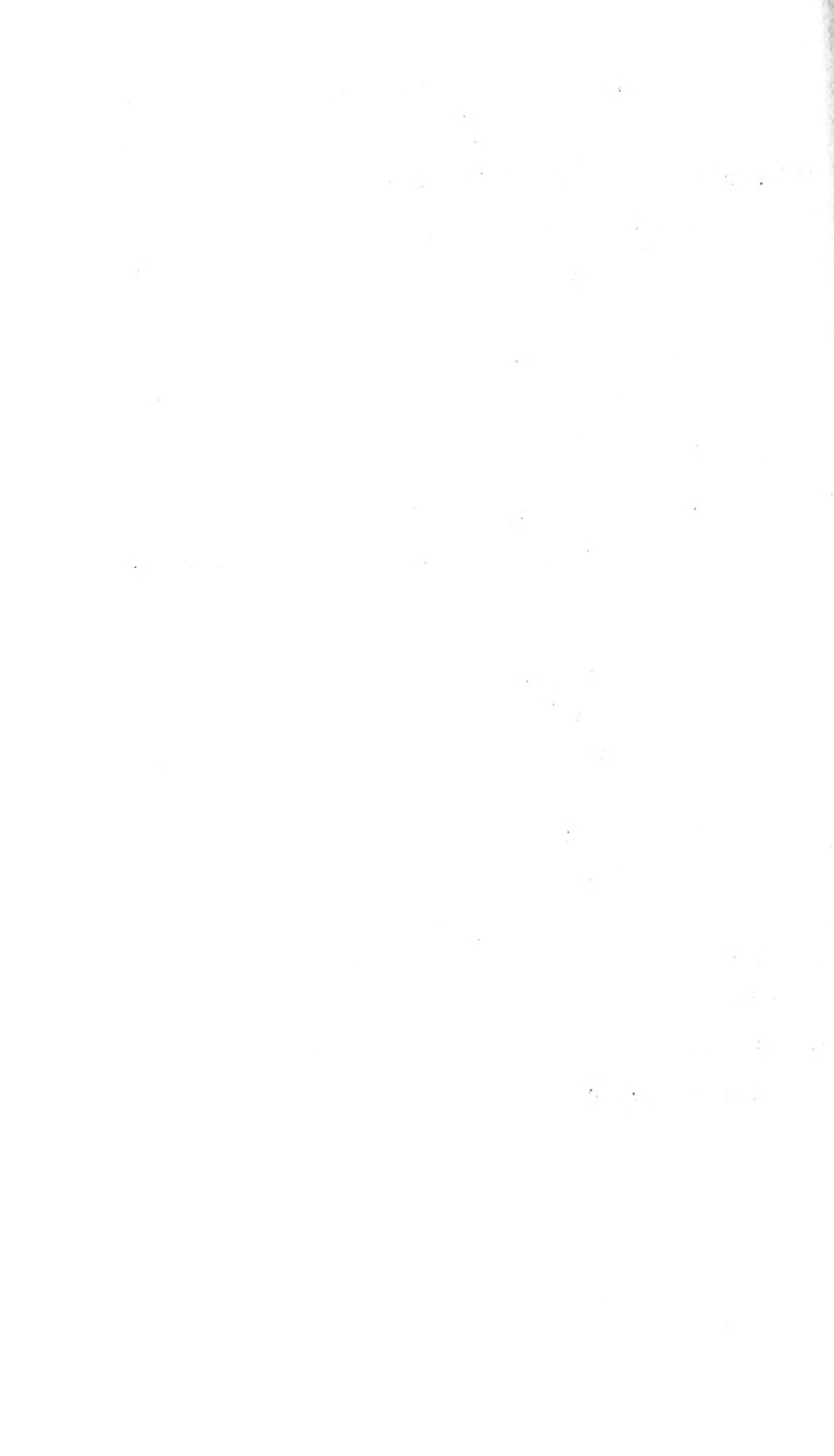
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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

For the Plaintiff, United States of America,
United States District Attorney,
Federal Building,
— Honolulu, T. H.

For the Defendants, Miner Lii and Alice Lii,
O. P. SOARES, ESQ.,
1-2 Union Trust Building,
Honolulu, T. H.



In the United States District Court
For the District of Hawaii

Cr. No.
(18 U.S.C. Sec. 2421)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MINER LII and ALICE LII,
Defendants.

INDICTMENT

The Grand Jury Charges:

That on or about the 9th day of October, 1950, Miner Lii and Alice Lii did knowingly, wilfully, unlawfully and feloniously procure and obtain a ticket from the office of Pan American World Airways at 222 Stockton Street, San Francisco, California, to be used by a woman, namely, Sara Wright, in interstate commerce in going from San Francisco, California to the City and County of Honolulu, Territory of Hawaii and within the jurisdiction of this Court, for the purpose of prostitution, debauchery and other immoral purposes, which said ticket was used by the said Sara Wright in interstate commerce in going from San Francisco, California to the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, for the purpose of prostitution, debauchery and other immoral purposes, which said ticket was used by the said Sara Wright in going from San Francisco, California to the City and County of Hono-

lulu, Territory of Hawaii, for the purposes aforesaid in violation of Section 2421, Title 18, United States Code.

Dated: Honolulu, T. H., this 14th day of March, 1951.

A TRUE BILL,

/s/ ROBERT D. FISCHER,
Foreman, Grand Jury.

/s/ HOWARD K. HODDICK,
United States Attorney.

Presented in open Court by the Grand Jury on Mar. 14, 1951.

ORDER

I hereby order a Bench Warrant to issue forthwith on the within indictment for the arrest of the defendants named therein, bail hereby being fixed at \$1,500 each.

/s/ D. E. METZGER,
Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed March 14, 1951.

From the Minutes of the United States District Court for the District of Hawaii

[Title of Cause.]

MONDAY, MAY 21, 1951

On this day came Mr. Nat Richardson, Assistant United States District Attorney, and also came the

defendants herein with Mr. O. P. Soares, their counsel. This case was called for trial.

At 11:30 a.m., the following jurors were duly empaneled and sworn to try the issues herein: Vincent T. Wong, Wilbert Y. Yagi, Alexander Smith, Abel D. F. Spinola, Tomoyuki Masada, Earl J. Ford, Lawrence M. Shigeura, Frederick A. Smith, Harry H. S. Young, William C. Kea, Severino G. Alipio, and Frank S. Kruger.

The Court then ordered this case continued to 1:30 p.m. this day for further trial.

At 1:30 p.m., opening statement was made by Mr. Richardson.

All witnesses were placed under Rule of Court and excluded from the courtroom.

At 1:35 p.m., opening statement was made by Mr. Soares.

At 1:40 p.m., Miss Sarah Lee Wright was called and sworn and testified on behalf of the United States.

At 3:27 p.m., Mr. Edward G. Velazquez, Senior Cashier, Pan-American Airways, San Francisco, California, was called and sworn and testified on behalf of the United States.

Agent's coupon, Pan-American World Airways System, No. 463792, was admitted in evidence as Plaintiff's Exhibit "A-1," marked and ordered filed.

Agent's coupon, Pan-American World Airways System, No. 463793, was admitted in evidence as Plaintiff's Exhibit "A-2," marked and ordered filed.

Cashier's Receipt for Fare on Tickets Nos. 463792

and 463793 was admitted in evidence as Plaintiff's Exhibit "B," marked and ordered filed.

At 3:40 p.m., Mr. Frank Sampson, Merchant Seaman, was called and sworn and testified on behalf of the plaintiff.

At 4:15 p.m., the Court ordered this case continued to May 22, 1951, at 9:30 a.m. for further trial.

From the Minutes of the United States District
Court for the District of Hawaii

[Title of Cause.]

TUESDAY, MAY 22, 1951

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendants herein with Mr. O. P. Soares, their counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 9:32 a.m., the government rested.

Oral motion for acquittal as to the defendant Miner Lii was made by Mr. Soares and was overruled by the Court.

At 9:43 a.m., Mr. Harold John Lewis, a pilot, was called and sworn and testified on behalf of the defendants.

At 10:04 a.m., Mrs. Alice Lii was called and sworn and testified on her own behalf.

At 12:02 p.m., the Court ordered this case continued to May 23, 1951, at 9 a.m. for further trial.

From the Minutes of the United States District
Court for the District of Hawaii

[Title of Cause.]

WEDNESDAY, MAY 23, 1951

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendants herein with Mr. O. P. Soares, their counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 9:10 a.m., the defendants rested.

Miss Sarah Lee Wright was recalled and testified further.

At 9:45 a.m., Mr. John B. Kramer, Deputy Collector, Internal Revenue, was called and sworn and testified on behalf of the plaintiff.

At 9:50 a.m., Mr. William Samuel Holloway, Jr., Safety Engineer, Hawaii Aeronautics Commission, was called and sworn and testified on behalf of the plaintiff.

At 10:13 a.m., request was made by Mr. Soares for a continuance of one week to enable a material witness on behalf of the defendants to be present. Ruling on request was deferred to 1:30 p.m.

At 10:20 a.m., the Court ordered this case continued to 1:30 p.m. this day for further trial.

At 1:32 p.m., request of Mr. Soares for a continuance was denied by the Court.

Mr. Antone Tony Rapoza, Sales Representative,

Schuman Carriage Co., Ltd., was called and sworn and testified on behalf of the plaintiff.

Sales Memo., Schuman Carriage Co., Ltd., was admitted in evidence as Plaintiff's Exhibit "C," marked and ordered filed.

At 1:45 p.m., Mr. Harlow T. Ogata, Salesman, Universal Motor Co., Ltd., was called and sworn and testified on behalf of the plaintiff.

Car Invoice, Universal Motor Co., Ltd., was marked for identification as Defendants' "A-1."

Statement, Universal Motor Co., Ltd., was marked for identification as Defendants' "A-2."

At 2 p.m., Miss Lorraine Marjorie Staunton was called and sworn and testified on behalf of the plaintiff.

At 2:25 p.m., the plaintiff rested.

Mrs. Alice Lii was recalled and testified further.

At 2:30 p.m., request for a continuance to May 28, 1951, was renewed by Mr. Soares and was again denied by the Court.

Thereafter, both sides rested.

At 2:51 p.m., argument was had by Mr. Richardson.

At 3 p.m., argument was had by Mr. Soares, followed by Mr. Richardson at 3:40 p.m., in his closing argument.

At 3:42 p.m., the Court instructed the jury.

At 4:02 p.m., Mr. Otto F. Heine, United States Marshal, Mr. E. U. Moses and Mr. George E. Bruns, Deputy United States Marshals, were sworn as bailiffs to take charge of the jury during its deliberations.

At 4:55 p.m., the jury appeared and in the presence of respective counsel and the defendants and through their foreman returned the following verdicts of guilty which were ordered to be placed on file:

* * *

[To avoid duplication, copies of the verdicts which are recorded on the original minutes are not set forth here, the same being exact copies of the signed originals thereof which follow.]

[Title of District Court and Cause.]

VERDICT AS TO MINER LII

We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Miner Lii, Guilty as charged in the indictment herein.

Dated: Honolulu, T. H., this 23rd day of May, 1951.

/s/ EARL J. FORD,
Foreman.

[Endorsed]: Filed May 23, 1951.

[Title of District Court and Cause.]

VERDICT AS TO ALICE LII

We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Alice Lii, Guilty as charged in the indictment herein.

Dated: Honolulu, T. H., this 23rd day of May, 1951.

/s/ EARL J. FORD,
Foreman.

[Endorsed]: Filed May 23, 1951.

From the Minutes of the United States District
Court for the District of Hawaii

[Title of Cause.]

THURSDAY, MAY 31, 1951

On this day came Mr. Nat Richardson, Jr., Assistant United States District Attorney, and also came the defendants herein with Mr. O. P. Soares, their counsel. This case was called for sentence.

The Court ordered each defendant committed to prison for a period of Four Years and each defendant was ordered to pay a fine in the sum of \$1,000.00.

Notice of appeal was given and bond on appeal was set in the sum of \$3,000.00 each.

The Judgment and Commitment as to each defendant reads as follows:

* * *

[To avoid duplication, copies of the judgments and commitments which are recorded on the original minutes are not set forth here, the same being exact copies of the signed originals thereof which follow.]

District Court of the United States for the
District of Hawaii

Cr. No. 10,419
(18 U.S.C., Sec. 2421)

UNITED STATES OF AMERICA,

vs.

MINER LII and ALICE LII.

JUDGMENT AND COMMITMENT AS TO
MINER LII

On this 31st day of May, 1951, came the attorney for the government and the defendant appeared in person and by counsel; O. P. Soares, Esquire.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of knowingly, wilfully, unlawfully and feloniously procuring and obtaining an airline ticket to be used by a woman, in interstate commerce in going from San Francisco, California to Honolulu, T. H. for the purpose of prostitution, debauchery and other immoral purposes, in violation of Section 2421, Title 18, United States Code, as charged and the court having asked the defendant whether he has anything to say why judgment should

not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years and fined the sum of one-thousand dollars (\$1,000.00).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ D. E. METZGER,

United States District Judge.

/s/ WM. F. THOMPSON, JR.,

Clerk.

[Endorsed]: Filed May 31, 1951.

District Court of the United States for the
District of Hawaii

Cr. No. 10,419
(18 U.S.C., Sec. 2421)

UNITED STATES OF AMERICA,

vs.

MINER LII and ALICE LII.

JUDGMENT AND COMMITMENT AS TO
— ALICE LII

On this 31st day of May, 1951, came the attorney for the government and the defendant appeared in person and by counsel; O. P. Soares, Esquire.

It Is Adjudged that the defendant has been convicted upon her plea of not guilty and a verdict of guilty of the offense of knowingly, wilfully, unlawfully and feloniously procuring and obtaining an airline ticket to be used by a woman, in interstate commerce in going from San Francisco, California to Honolulu, T. H. for the purpose of prostitution, debauchery and other immoral purposes, in violation of Section 2421, Title 18, United States Code, as charged and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his

authorized representative for imprisonment for a period of four (4) years and fined the sum of one-thousand (\$1,000.00).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ D. E. METZGER,

United States District Judge.

/s/ WM. F. THOMPSON, JR.,

Clerk.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellants: Miner Lii and Alice Lii, 1639-F Liliha Street, Honolulu, Hawaii.

Name and address of appellants' attorney: O. P. Soares, P. O. Box 2702, Honolulu 3, Hawaii.

Offense: 18 U.S.C. Sec. 2421.

Concise statement of judgment or order, giving date, and sentence: Upon verdict of guilty returned by the jury on the 23rd day of May, 1951, each of the defendants were adjudged guilty by the judge of the above-entitled court presiding at the trial, who on the 31st day of May, 1951, pronounced sentence as to defendant Miner Lii

4 years imprisonment and \$1,000.00 fine and as to defendant Alice Lii 4 years imprisonment and \$1,000.00 fine.

We, the above named appellants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment and sentence, and we give notice that we elect not to enter upon the service of our respective sentence pending appeal.

Dated at Honolulu, Hawaii, this 31st day of May, 1951.

/s/ MINER A. LII,

/s/ ALICE LII.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

ORDER ADMITTING TO BAIL PENDING
APPEAL TO THE NINTH CIRCUIT
COURT OF APPEALS

Miner Lii and Alice Lii, having duly filed and served a notice of appeal and a notice electing not to enter upon the service of their sentence pending appeal from the judgment of conviction rendered herein and from the sentence herein imposed on the 31st day of May, 1951, which said appeal involves a substantial question, it is

Ordered that the defendants Miner Lii and Alice Lii be set at liberty upon furnishing a bond in the

sum of \$3,000.00 each, during the dependence of said appeal in the United States Court of Appeals for the Ninth Circuit, and until the mandate of said Court of Appeals shall be issued and filed in said appeal and order entered thereon.

Dated at Honolulu, Hawaii, this 31st day of May, 1951.

/s/ D. E. METZGER,

United States District Judge.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

BOND

(Miner Lii)

Know All Men by These Presents:

That we, Miner Lii, as principal, and Fong Hing and Leonard K. M. Fong, as sureties, are held and firmly bound unto the United States of America in the full sum of \$3,000.00 for the payment of which well and truly to be made we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately in the United States District Court in and for the District and Territory of Hawaii judgment and sentence were made and entered against Miner Lii, defendant above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the

Ninth Judicial Circuit to secure a reversal of said judgment and sentence, and

Whereas, the Honorable Delbert E. Metzger, Judge of said District Court, did regularly order that a supersedeas bail bond be given in the sum of \$3,000.00 pending said appeal.

Now, Therefore, the condition of the above obligation is such that if the said Miner Lii shall appear here in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against him shall be reversed by said Circuit Court, and if he shall not leave the territorial jurisdiction of the City and County of Honolulu, Territory of Hawaii, without first obtaining the permission of Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden principal and sureties have hereunto affixed their hands this 31st day of May, 1951.

/s/ MINER A. LII,
Principal.

/s/ FONG HING,
Surety.

/s/ LEONARD L. M. FONG,
Surety.

Taken and acknowledged before me this 31st day of May, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court.

Territory of Hawaii,
City and County of Honolulu—ss.

Fong Hing, being first duly sworn, on oath deposes and says that he is the Fong Hing named as a surety and who filed the foregoing Bond and that he is worth the sum of \$6000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ FONG HING.

Subscribed and sworn to before me this 31st day of May, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court.

Territory of Hawaii,
City and County of Honolulu—ss.

Leonard K. M. Fong, being first duly sworn, on oath deposes and says that he is the Leonard K. M. Fong named as a surety and who filed the foregoing Bond and that he is worth the sum of \$6000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LEONARD K. M. FONG.

Subscribed and sworn to before me this 31st day of May, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court.

Approved as to form:

/s/ NAT RICHARDSON, JR.,
United States Attorney.

Approved as to the amount and sufficiency of surety:

/s/ D. E. METZGER,
Judge, United States District
Court.

[Endorsed]: Filed May 31, 1951. [20]

[Title of District Court and Cause.]

BOND

·(Alice Lii)

Know All Men by These Presents:

That we Alice Lii, as principal, and Fong Hing and Leonard K. M. Fong, as sureties, are held and firmly bound unto the United States of America in the full sum of \$3,000.00 for the payment of which well and truly to be made we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, Lately in the United States District Court in and for the District and Territory of Hawaii judgment and sentence were made and entered against Alice Lii, defendant above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to secure a reversal of said judgment and sentence, and

Whereas, the Honorable Delbert E. Metzger, Judge of said District Court, did regularly order that a supersedeas bail bond be given in the sum of \$3,000.00 pending said appeal.

Now, Therefore, the condition of the above obligation is such that if the said Alice Lii shall appear here in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute her appeal and shall abide by

and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the judgment of said District Court against her, and shall surrender herself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against her shall be affirmed or the appeal dismissed; and if she shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against her shall be reversed by said Circuit Court, and if she shall not leave the territorial jurisdiction of the City and County of Honolulu, Territory of Hawaii, without first obtaining the permission of Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden principal and sureties have hereunto affixed their hands this 31st day of May 1951.

/s/ ALICE LII,
Principal.

/s/ FONG HING,
Surety.

/s/ LEONARD K. M. FONG,
Surety.

Taken and acknowledged before me this 31st day of May, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court.

Territory of Hawaii,
City and County of Honolulu—ss.

Fong Hing, being first duly sworn, on oath deposes and says that he is the Fong Hing named as a surety and who filed the foregoing Bond and he is worth the sum of \$6000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ FONG HING.

Subscribed and sworn to before me, this 31st day of May, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court.

Territory of Hawaii,
City and County of Honolulu—ss.

Leonard K. M. Fong, being first duly sworn, on oath deposes and says that he is the Leonard K. M. Fong named as a surety and who filed the foregoing Bond and that he is worth the sum of \$6,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LEONARD K. M. FONG.

Subscribed and sworn to before me this 31st day of May, 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court.

Approved as to form:

/s/ NAT RICHARDSON, JR.,
United States Attorney.

Approved as to the amount and sufficiency of
surety:

/s/ D. E. METZGER,
Judge, United States District
Court.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled action, through their respective counsel, that at a hearing in the chambers of the Honorable Delbert E. Metzger, judge of the above entitled Court, presiding at the trial of the above entitled action, which said hearing was at the request of said judge, for the purpose of settling the instructions requested by the respective parties to the above entitled cause and which said hearing was held before the jury retired

and out of the presence of the jury, defendants requested the following instructions, namely:

DEFENDANT'S INSTRUCTION No. 1

"I instruct you, gentlemen of the jury, to find the defendants not guilty."

which request was refused by said judge, to which said refusal, defendants, through their counsel, objected on the ground that the evidence was insufficient to sustain the allegations of the indictment as to each of the defendants.

Dated at Honolulu, Hawaii, this 6th day of July, 1951.

MINER LII, and
ALICE LII,
Defendants.

By /s/ O. P. SOARES,
Their Attorney.

UNITED STATES OF
AMERICA,
Plaintiff.

By /s/ HOWARD K. HODDICK,
Acting United States
Attorney, District of
Hawaii.

[Endorsed]: Filed July 6, 1951.

In the United States District Court for the
District of Hawaii

Criminal No. 10,419

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINER LII and ALICE LII,

Defendants.

— TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., commencing on May
21, 1951, and ending on May 23, 1951,

Before: Hon. Delbert E. Metzger,
Judge, and a Jury.

Appearances:

NAT RICHARDSON, JR.,

Assistant U. S. Attorney, appearing for
Plaintiff;

O. P. SOARES, ESQ.,

Appearing for the Defendants.

(9:30 a.m.)

The Clerk: Criminal No. 10,419, United States
of America, Plaintiff, versus Miner Lii and Alice
Lii, Defendants; case called for trial.

Mr. Soares: If the Court please. unfortunately
I will have to ask the Court to take a 10-minute
recess to see if I can get a line on my clients. There
seems to be some confusion. They are not here. I
last talked to my clients on Thursday. I know that

there was a case in which they were witnesses in the District Court today, and it is possible that they may have confused that court with this one. And I should like an opportunity to do some telephoning to see if I can straighten the thing out.

The Court: All right.

(A recess was taken.)

The Court: Miner Lii and Alice Lii, why were you not present this morning when your case was called at half past nine?

Miner Lii: I was finding for that letter. I thought it was Wednesday.

The Court: You thought it was Wednesday?

Miner Lii: That's right, your Honor.

The Court: And why were you not present?

Alice Lii: Well, I understood it was Wednesday, so I [2*] was home.

The Court: Well, your lawyer knew it was on Monday and he tells me that he told you it was on Monday. You kept 28 jurors waiting here now for practically an hour. The Court finds you in contempt, each of you, for not being here when your case was called. And I fine you each \$50 a piece, and you will be in the custody of the Marshal until that fine is paid.

Call the jurors.

The Clerk: Criminal No. 10,419, United States of America, Plaintiff, versus Miner Lii and Alice Lii, Defendants; case called for trial.

Mr. Soares: If the Court please, we would be

* Page numbering appearing at top of page of original Reporter's Transcript.

ready for trial except for this incident now, in the presence of the jury, which we submit was prejudicial to the defendant's rights to a fair and impartial trial, the Court having found in the presence of the jury the defendants guilty in contempt and assessing a fine and ordering them into the custody of the Marshal. I submit that it interferes with their obtaining a fair and impartial trial.

The Court: I see no point whatever in your objection.

— Mr. Soares: I take an exception.

The Court: Call the jury.

(A jury was duly impaneled and sworn.) [3]

Mr. Soares: If the Court please, I will ask that all witnesses be placed under the rule.

The Court: Well, we won't proceed into the trial just now. How many of you jurors have never sat before? How many have never sat in a criminal trial as jurors? How many have never sat in a criminal trial in any court? (Several hands.) Well, now, I instruct you in advance that a person charged or indicted with having committed a crime, that the indictment, the accusation, is nothing more than an accusation. It just simply brings them to face the trial. Every person who may be charged with a crime is supposed to be, presumed to be innocent of that charge until they are proven guilty, and they must be proven guilty in the eyes of the jury and the Court beyond all reasonable doubt. Now, reasonable doubt—many definitions have been

given to describe what a reasonable doubt is, and in the final analysis it comes down to about this: that if a doubt persistently is well enough established in the mind of a person to guide his conduct in the serious affairs of life, if it is a well-established doubt based upon sound reasoning arising from the facts, that, then, is a reasonable doubt. The Court will, when the general and complete instructions are given, give you a definition as to reasonable doubt.

Now, you are trying these defendants for just what they are indicted for in this case, and nothing else. What their [4] conduct may have been in other affairs is of no concern to you in trying this case. You were present when the Court had been aggrieved by their failure to be here at the time set for trial and the Court found them in contempt, guilty of contempt, and punished them. That is of no consideration to you gentlemen at all. It doesn't enter into this trial of this case in any respect whatsoever. In your minds it should not.

You will be excused now until 1:30 this afternoon, and then you will come in to hear the evidence in the case. The remaining jurors who haven't been called to try this case are excused until Thursday morning of this week. That is May 24th, at 9:30 o'clock in the morning; Thursday morning at 9:30. We will now adjourn, recess, until 1:30.

(The Court recessed at 11:30 a.m.) [5]

Afternoon Session

The Court: The jurymen are all in the box. You may proceed.

Mr. Richardson: If your Honor please, I'd like to make a short opening statement.

The Court: Yes, I'd like to have it, to have you inform the jury.

Mr. Richardson: If your Honor please, gentlemen of the jury, the Government will undertake to show in this case that last October, 1950, the defendants, Miner Lii and Alice Lii were in San Francisco, California. While they were there they met a girl named Sarah Lee Wright and they made a proposition to this girl to come to Honolulu and work as a prostitute in the residence which the Liis occupied; that they had several conferences about coming over, about Sarah Lee Wright coming with them; and that they bought a ticket to pay for her passage from San Francisco to Honolulu. They did come over, she came over with them, and they worked her as a prostitute in the premises occupied by Mr. and Mrs. Lii, and she turned over half of her earnings to the defendants.

The specific offense which is charged in the indictment is the procuring of the ticket to pay for the transportation for this Sarah Lee Wright from San Francisco to Honolulu.

We further intend to prove all the material allegations [6] in the indictment.

The Court: Are there any persons in the courtroom who have been subpoenaed as witnesses or

have reason to believe that they will be called as witnesses? If there are, they will retire out of the courtroom.

Mr. Soares: Well, has your Honor limited that only to those who were subpoenaed?

The Court: Those who have reason to believe that they will be called.

Mr. Soares: Well, I will invoke the rule which, as I understand it, is that any witnesses are not to be in the courtroom while the trial is on.

The Court: Well, that is what I intended to say.

Mr. Soares: Yes. I'd like to make a statement.

The Court: I have frequently made an exception in behalf of the F. B. I. agents or others who are able to guide the prosecution in their work.

Mr. Richardson: If your Honor please, Mr. Limprecht is with the F. B. I. and I'd like to have him remain as my witness. It might be that we won't put him on.

Mr. Soares: Well, we make an objection to it and submit to the Court's ruling.

Mr. Richardson: If your Honor please, I understand that I am entitled to have one witness remain in the courtroom.

The Court: I don't know that you are entitled to it. [7] I think it is a matter of discretion of the Court. I have made no exception in using my discretion to permit the chief aid to the prosecution to remain in here, and the same thing would be true with the defendants.

Mr. Soares: May I make an opening statement on behalf of the defendants at this time?

The Court: Yes.

Mr. Soares: May it please the Court and you gentlemen of the jury, when this case reaches the part where the defendant is required to put on any evidence, we will expect to show—and some of these facts may be elicited from the prosecution witnesses themselves—we think that they will be if the truth is told—and I understand it to be, that Miner Lii and his wife went to San Francisco for a vacation. Miner Lii had a brother there who is a seaman, whom he hadn't seen for some years. And among the things that he expected to do was to see his brother. Mrs. Lii, I believe, had never been on the mainland.

While on the mainland they visited several night spots and were entertained by a friend of theirs. I can't give you her exact name right now but I think it is Mary Chang, if I am not mistaken, who introduced her to Sarah Lee Wright. Sarah Lee Wright was a known prostitute, that is, known to the police of San Francisco, having practiced her profession around the bay area for some time, including Stockton and [8] Sacramento, I think. These facts were not then known to the Liis.

For a long time the police have been trying to get something on Miner Lii. I think the facts will be disclosed in the evidence that he has had difficulty with the police on several occasions, some of which, in some of which he has been beaten up and in others of which he has beaten up the police. If he takes the witness stand, I think the prosecution will bring out from him the prior convictions which

will include these convictions and one very early sex offense some ten years or more ago.

The evidence will show that this Sarah Lee Wright was picked up by the police independently of any connection with Miner Lii for prostitution, and was charged with that offense; that the case was set for trial some time before this indictment; and that Sarah Lee, either at the suggestion of the city police or through her own ideas, conceived the idea of placing the responsibility on Miner Lii and his wife for being here in Honolulu.

Now, it is true that Mrs. Lii had invited her friend Mary Chang, I think—and if the plane schedules aren't disrupted we expect to have Mary here as a witness—had invited her to visit with her; that Sarah Lee Wright had conceived the idea of coming to Honolulu, too, and asked for assistance to come here for a visit; that Mrs. Lii purchased the ticket, [9] and all three of them came; that there was no arrangement whereby Sarah Lee Wright was to engage in the business of prostitution, and especially was there no arrangement that Miner Lii or Mrs. Lii were to share in her earnings.

We will show that she has had a varied experience in prostitution in Honolulu, none of which was connected up with Miner Lii; that after she ran afoul of the police, trying to protect herself and succeeding, as a matter of fact, in getting the city police to dismiss the charges against her, that she even went to the extent of trying to get money from Miner Lii, and he, suspecting that something was wrong, asked her to accompany him to the city

prosecutor's office, and she did. He went into the office and when she found that he was in consultation with Mr. Hawkins, the public prosecutor, she made her departure from the office and didn't make any statement to Mr. Hawkins.

We will not only bring evidence to show that the defendant did not commit this particular crime or any crime connected with white slavery, but we will, I think, have evidence enough to satisfy you that the whole motive of this was the desire of Sarah Lee Wright to protect herself against prosecution by the city police, and an understandable desire on the part of the city police to finally get something on Miner Lii.

Mr. Richardson: Call Miss Sarah Lee Wright.

SARAH LEE WRIGHT

a witness on behalf of [10] the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you state your full name?

A. Sarah Lee Wright.

Q. And, Miss Wright, you will have to speak out loud so all these gentlemen can hear you. How long have you been in Honolulu, Miss Wright?

A. Going on eight months.

Q. When did you come out? Do you recall the month?

A. October.

Q. October of last year?

A. Yes.

(Testimony of Sarah Lee Wright.)

Q. Now, Miss Wright, do you know the defendants in this case, Miner Lii and Alice Lii, his wife?

A. Yes, sir.

Q. Do you see them here in the courtroom?

A. Yes, sir.

Q. Can you identify them? A. Yes.

Q. Point them out.

A. There. (Indicating defendants.)

Mr. Richardson: Let the record show, if your Honor please, that she has identified the defendants.

Q. Miss Wright, where did you meet Miner Lii and his [11] wife, Alice Lii?

A. San Francisco.

Q. And when was that? What month was it?

A. October, the same month I came over here.

Q. That is, October of last year? A. Yes.

Q. Now, where did you meet them in San Francisco, Miss Wright?

A. Around a bar on Kearny Street, Blanco's.

Q. Is it B-l-a-n-c-o?

A. B-l-a-n-c-o. I don't know.

Q. At any rate, it is a place known as Blanco's bar on Kearny? A. Yes.

Q. Now, tell the Court and gentlemen of the jury how you happened to meet the defendants and what took place when you met them?

A. Well, a friend introduced me to Miner.

Q. Is that a friend of yours or a friend of his?

A. Well, I guess it's a friend of both of ours. And then I drank a coke.

Q. Just a little bit louder, Miss Wright.

(Testimony of Sarah Lee Wright.)

A. I drank a coke in the bar and then they come in and they wanted me to talk to them in the car. And I went out and talked to them in the car. [12]

Q. Just a minute, now. You mean Mr. and Mrs. Lii had a car outside?

Mr. Soares: We object to leading questions.

Mr. Richardson: I didn't understand it, if your Honor please.

The Witness: They were in——

—Mr. Richardson: Just a minute.

Mr. Soares: The question is leading, whether or not counsel understood it or not.

Q. (By Mr. Richardson): Just go ahead and tell what happened, Miss Wright?

A. And then they propositioned me about coming to Honolulu.

Q. Well, now, first you met them in the bar, is that correct?

A. Yes, around the bar. First I was introduced to Miner right at the door, at the bar, on the sidewalk, rather. And then I was in the bar and they come and got me and wanted to talk to me in the car.

Q. Did you do that? A. Yes, sir.

Q. And who all went out in the car?

A. There was Mr. and Mrs. Lii in the back seat, and the fellow who introduced me to them and I in the front seat.

Q. You all got in the car, did you? [13]

A. Yes.

Q. All right, now, just tell what was said?

(Testimony of Sarah Lee Wright.)

A. Well, I turned around and I said, "You want to talk to me?" And they propositioned me about coming to Honolulu.

Q. What did they say about coming to Honolulu?

A. They asked me if I wanted to come over here and work.

Q. When they said "work," what do you understand that to mean?

A. Well, I mean—prostitution.

Q. Was it understood between you that you were to come as a prostitute? A. Yes.

Mr. Soares: I object to that as leading and calling for a conclusion of the witness.

The Court: Can't you elicit what you want without any indication of leading the witness?

Mr. Richardson: Well, if your Honor please, I am trying to get her to say what happened there. I will try to do better on it.

Q. (By Mr. Richardson): Just tell what was said there, Miss Wright, with reference to you coming to Honolulu and working.

A. So they told me what it was all like, what it was like, and that I'd work in there, in their house, and they [14] already had the men and how much it was and everything. I mean, they let me know what everything was going to be like.

Mr. Soares: I can't hear the witness, if the Court please.

Mr. Richardson: Try to speak a little louder. I'm afraid the jury can't hear you, either.

(Testimony of Sarah Lee Wright.)

Q. Now, arrangements were made about the money that you received——

Mr. Soares: I object to that as leading and suggestive and assuming something not in evidence.

Mr. Richardson: That is not a leading question. I am asking what arrangements were made. It doesn't suggest an answer.

The Court: You spoke about being invited to come, did you not?

The Witness: Yes, sir.

The Court: Well, now, can you tell from there on what arrangement was made, if any?

The Witness: Yes. I told them after we got through talking, I told them I would think it over.

The Court: You are not talking to me; you are talking to the jury and counsel.

The Witness: I told them that I would think it over and I would let them know, which I always wanted to come to Honolulu.

Mr. Soares: I didn't hear that. [15]

The Court: She said she always wanted to come to Honolulu.

Q. (By Mr. Richardson): All right, Miss Wright. Was that at nighttime when you first met them? A. Yes, sir.

Q. When did you next see them?

A. The next day.

Q. Well, now, was it in the morning or afternoon or when the next day?

A. It was in the afternoon, early afternoon.

Q. And where did you see them at that time?

(Testimony of Sarah Lee Wright.)

A. In Blanco's bar.

Q. At the same place? A. Yes.

Q. All right. What other conversation took place then with reference to you coming to Honolulu?

A. They just asked if I was going to go, and I said I'd let them know.

Q. You hadn't made up your mind at that time?

A. No.

Q. Did any other conversation take place there?

A. No, sir.

Q. All right, now, when did you see them again?

A. Well, I saw them about every day. And on the third day I let them know for sure if I was coming or not. [16]

Q. Whom did you talk to? Did you talk to Mr. Lii or his wife or who?

A. Well, both of them know I was coming.

Mr. Soares: I didn't hear that.

(The reporter read the last question and answer.)

Q. (By Mr. Richardson): Did that conversation take place in Blanco's bar also?

A. Yes.

Q. And they were both present, is that correct?

A. Yes.

Mr. Soares: I must ask the Court to admonish Counsel not to lead the witness. He just tells her exactly what he wants her to say.

Mr. Richardson: She just testified——

Mr. Soares: Yes, but she didn't testify as Coun-

(Testimony of Sarah Lee Wright.)

sel is trying to get her to testify, as in the last question. He just puts the words in her mouth.

Q. (By Mr. Richardson): Well, state whether or not, Miss Wright, whether they were both present with you when you met them?

A. Yes, they were.

Q. Now, what arrangement was made with reference to a ticket to come over here, Miss Wright?

—A. Well, when I told them I was going to come, they was going to make reservation on another flight, but it seems as [17] if they didn't have enough seats for three.

Q. Who was going to make those reservations?

A. Miss Lii.

Q. You mean Mrs. Lii, the wife?

A. Yes, Mrs. Lii.

Q. All right.

A. And then we didn't do it in the bar because it's a public telephone, you know; it has no booth. So I went across the street to the gas station.

Q. Who went across the street?

A. All three of us.

Q. All right.

A. And while Mrs. Lii was in the telephone, in the booth, and I was almost in the booth, at least this much of me was in the booth (indicating), why, she made the reservation.

Mr. Soares: I can't hear, if the Court please. It seems to me she could talk louder.

(Testimony of Sarah Lee Wright.)

Q. (By Mr. Richardson): Could you overhear the conversation, Miss Wright?

Mr. Soares: We object to that as leading and suggestive.

Mr. Richardson: It is a proper conversation.

The Court: I see nothing leading about the question.

Mr. Soares: The fact that he suggests to her that he wants her to say—— [18]

The Court: I don't know what he wants her to say.

Mr. Soares: I am pointing out, if I may, in support of my objection that this question is practically telling this witness to say that she overheard the conversation.

The Court: I can't see that at all. She could just as readily say, No, that she didn't.

The Witness: Yes, I did.

Mr. Soares: Save an exception to the ruling of the Court.

Q. (By Mr. Richardson): What was your answer?

A. Yes, I did. I was almost in the booth with her and the door was open. I was half in the telephone booth.

Q. Whom did she call?

A. Pan-American.

Q. You heard that? A. Oh, yes.

Q. How many reservations did she make?

A. For three.

Q. To leave at what time?

(Testimony of Sarah Lee Wright.)

A. At nine o'clock Monday morning.

Q. Now, what day of the week was this that she made the call, if you recall?

A. I don't quite remember because, I mean, it was a holiday and then there was a parade and everything. I couldn't remember whether it was a Saturday or Sunday. [19]

Q. Well, I will ask you, then, was it several days before you left?

—A. Even the day before, I think.

Q. All right, now, after that, did you have any further conversations with these Defendants about coming over here?

A. Oh, yes. The night, Sunday night, we all went out and was talking about me coming over here.

Q. Well, now; what, if anything, what conditions were attached to the money that you would, that you were to make?

A. You see, when I first talked to them I told them I couldn't go because I didn't have any money. He said that was quite all right because he'd pay my way.

Q. Well, then, I will ask you whether or not you did leave the following Monday?

A. Yes, we left on a Monday.

Q. What time did you leave?

A. Nine o'clock in the morning.

Q. Now, who was with you when you left?

A. When we got on the plane?

Q. Yes.

(Testimony of Sarah Lee Wright.)

A. Myself, Mr. and Mrs. Lii, and a friend.

Q. I didn't hear. A. And a friend.

Mr. Soares: May I have the answer read?

(The reporter read the last answer.) [20]

Q. (By Mr. Richardson): Who was this friend?

A. Mary Chang.

Q. Now, when you got here, Miss Wright, I believe you said that was Monday morning that you left?

A. Yes, sir.

Q. You got in here Monday afternoon?

A. Yes, sir.

Q. When you got here, Miss Wright, where did you go?

A. To Mr. and Mrs. Lii's house.

Q. And how long did you live there in Mr. and Mrs. Lii's house?

A. About seven weeks.

Q. Now, what were you doing while you were there, Miss Wright?

A. Working.

Mr. Soares: I object to it, Counsel, as incompetent, irrelevant and immaterial, and not within the issues here.

Mr. Richardson: If your Honor please, it is within the issues here.

The Court: Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): What were you doing here?

A. Working. [21]

Q. What do you mean, "working," Miss Wright? Just speak out and tell the Court and jury.

A. Working as a prostitute.

Q. Now, the money that you made there working as a prostitute, what did you do with that?

(Testimony of Sarah Lee Wright.)

A. I bought clothes and I have been living on some of it.

Q. Did you keep all the money yourself?

A. No.

Mr. Soares: When this witness speaks up, I am going to be forced to call these continuous interruptions——

Q. (By Mr. Richardson): Well, what did you do with the money that you didn't keep yourself, Miss Wright? A. Well, you mean my share?

Q. I don't know what your share is.

A. Well, half went to them and half went to me.

Q. When you say half went to them, whom do you mean? A. Mr. and Mrs. Lii.

Q. Was that one of the conditions that was attached to your coming out here? A. Yes.

Mr. Soares: I object to that as leading and suggestive.

Mr. Richardson: It is not. I am asking if it was. It suggests no answer. [22]

The Court: Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): Can you answer that, Miss Wright? A. Yes, sir.

Q. Your answer is that it was a condition?

A. Yes.

Q. Is that right?

A. Yes, it was a condition.

Q. Now, how long did you stay there?

A. Seven weeks.

Q. Eleven weeks? A. Seven.

(Testimony of Sarah Lee Wright.)

Q. During that time, Miss Wright, how much money did you make from prostitution?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, and not within the issues here, and can only serve to prejudice the jury against these defendants.

Mr. Richardson: If your Honor please,—

Mr. Soares: It is a matter not involved in the charge.

Mr. Richardson: —it is competent in this sense: we have to establish under the statute that she did come over and work as a prostitute in order to make out a case. Now certainly that is a circumstance that if we can show that is so, it has some probative value to go to the jury. [23]

Mr. Soares: That is not my understanding of the statute, this phase of the statute, at all. It would be a violation whether she worked here or not. That doesn't enter into it. That is a separate and distinct offense not alleged in the indictment. This particular offense is complete when they procured the tickets for that purpose, and if she uses the tickets. What she does after she gets here doesn't make any difference at all to this particular offense.

Mr. Richardson: It is alleged in the indictment and is part of the offense, if your Honor please, that the ticket which we say these defendants procured for this witness, the ticket has to be used to bring her here for prostitution purposes. That is in the indictment and in the statute.

The Court: Well, she has already testified that

(Testimony of Sarah Lee Wright.)

she worked here as a prostitute under an arrangement with the Liis and at their house. Now, she made a reference to half of the remuneration she got was to go to the Liis and half to herself.

Mr. Richardson: Yes, sir.

The Court: What more do you want?

Mr. Richardson: Well, if your Honor please, it just shows the circumstances under which she was working. She can testify how much she made.

—The Court: Well, that otherwise brought into the case, if there was any question raised about it or not—you can ask [24] her if she made money and that there was such a division of profits.

Mr. Richardson: All right. I will put it this way, if your Honor please.

Q. During the seven weeks you stayed there, Miss Wright, did you make some money?

A. Yes, sir.

Q. And half of that money, without saying how much it was, half of it was paid to the Liis, is that correct?

A. Yes, sir.

Q. Now, getting back to when you were in San Francisco, on the Monday that you left, Miss Wright, who took you to the airport?

A. Frank Samson.

Mr. Soares: Who?

The Witness: Frank Samson.

The Court: Stamson?

The Witness: S-a-m-s-o-n.

Q. Whose car were you in, Miss Wright?

A. Mr. Samson's.

(Testimony of Sarah Lee Wright.)

Q. And who went to the airport with you?

A. Well, there was Mr. and Mrs. Lii, myself and my girl friend.

Q. That is this Miss Chang?

A. Yes, Mary Chang. [25]

Q. Now, have you been arrested and charged with prostitution since you have been here in Honolulu? A. No, sir.

Q. Were you working as a prostitute in San Francisco at the time you met the Liis?

A. No, sir.

Mr. Richardson: I think that's all.

Cross-Examination

By Mr. Soares:

Q. Do you mean to say that you had never been arrested and charged with prostitution since you have been in Honolulu? A. No, sir.

Q. Is that true? A. Yes, sir.

Q. Is that as true as everything else you have told us? A. Yes, sir.

Mr. Richardson: I object to that, if your Honor please. She says she has not. If he has any proof to contradict it, he can introduce it.

Q. (By Mr. Soares): Have you been arrested and charged with anything, any crime?

A. No, sir.

Q. In Honolulu? What is your answer?

A. No, sir. [26]

Q. Weren't you represented in the District Court of Honolulu where you were charged with the offense

(Testimony of Sarah Lee Wright.)

of prostitution and represented by the firm of Landau and Fairbanks as your attorneys?

Mr. Richardson: If your Honor please, she answered that.

The Court: She may answer this. This is a specific question.

Q. (By Mr. Soares): Weren't you?

A. I was picked up, but I wasn't convicted.

Q. You weren't convicted? A. No, sir.

Q. But you were charged? A. Suspicion.

Q. You were charged and you were in court, weren't you? A. No, I did not go to court.

Q. You hired lawyers, didn't you?

A. I got a lawyer. I didn't go to court.

Q. And the charge was dropped later, wasn't it?

A. I don't know. I never went to court.

Q. What is that? You never have been in court?

A. No, sir.

Q. When you were picked up by the police here?

A. I don't remember.

Q. Well, about when? [27]

A. A couple of months ago, I suppose.

Q. Did you give bond? A. Yes.

Q. Do you know whether that bond is still in force? A. No, it isn't.

Q. How did you find out it isn't in force?

A. Oh, on the day that they dropped the case.

Q. What's that?

A. The day that they dropped the case.

Q. Who dropped the case? Who dropped what case? I thought you said you had no case.

(Testimony of Sarah Lee Wright.)

A. They picked me up. Naturally it's going to be a case. I didn't go to court, but I guess they dropped it if I didn't go. What else is there?

Q. Well, did anybody tell you they were going to drop the case?

A. Nobody told me nothing. I wasn't down there. I didn't go. It was in their office.

Q. Were you ever in the courtroom?

A. No, sir.

Q. Were you ever told by your lawyers when you were expected in court?

A. My lawyer?

Q. Yes, your lawyers.

A. I was supposed to go one morning. [28]

Q. What?

A. I was supposed to go one morning.

Q. Go where?

A. To court.

Q. Did your lawyers tell you that?

A. That's what they said. I went down to his office, but I didn't go.

Q. Why didn't you go?

A. I don't know. They said they dismissed, or something like that.

Q. Who told you it was dismissed?

A. Fairbanks.

Q. Where was he when he told you the case was dismissed?

A. I was in his office.

Q. Well, you did go to his office?

A. I said I was in his office.

Q. And do you know why he wanted you in his office that morning?

(Testimony of Sarah Lee Wright.)

A. For some money, I suppose. I hadn't paid him anything.

Q. Did he tell you that was the day the case was supposed to come up?

A. I knew it was or I wouldn't be down there.

Q. How did you know that was the day that case was going to come up? [29]

A. That's what they told me.

Q. Who told you?

A. Fairbanks, I suppose. Him or Shaffer.

Q. What's that?

A. Him or Sergeant Shaffer.

Q. Was Fairbanks there when Sergeant Shaffer talked to you? A. No, sir.

Q. When was it that Sergeant Shaffer talked to you?

Mr. Richardson: If your Honor please, I object to this. This is getting mighty far afield.

Mr. Soares: It is not, if the Court please. We have outlined what we expected to show.

The Court: I can't see where there is any legitimate cross-examination.

Mr. Soares: Searching out her motives for testifying in this case, if the Court please. And it is significant that the first time we mentioned Shaffer's name, that is when the objection is made. We have got all the preliminaries necessary to carry out what we told the jury we would expect to show, both by our evidence and by cross-examination, if the witness told the truth. And here it is. We have come right up to it now.

(Testimony of Sarah Lee Wright.)

The Court: Well, you are examining her now presumably as to her credibility. [30]

Mr. Soares: And her motive for testifying. And she is attempting to testify——

The Court: She has testified. Now, what is your question?

(The reporter read the last question.)

A. When I got—when they picked me up for suspicion of prostitution.

Q. (By Mr. Soares): Can you give us that date?

A. No, sir, I don't remember.

Q. Have you been picked up more than once?

A. No, sir.

Q. So that since the time that you have been speaking of, you haven't been picked up?

A. No, sir.

Q. You have been practicing prostitution from that time to this, haven't you? A. I have not.

Q. You know Richard Ho, H-o?

A. No, sir.

Q. You know a boy by the name of Whitey?

A. I know one by that name, yes.

Q. Who is he?

A. All I know him by is Whitey.

Q. How did you come to know him?

A. From eating in U.P.'s.

Q. What's that? [31]

A. From eating downtown.

Q. What is his business, do you know?

A. I don't know. I never asked.

Q. Do you know Gilbert Mun Lum?

(Testimony of Sarah Lee Wright.)

A. No.

Q. Or Lee Lum? A. No.

Q. What? A. No, sir.

Q. Do you know Alexander Mendoza?

A. Does he go by another name?

Q. Well, do you know anybody by the name of Alexander Mendoza?

A. I know somebody by the name of Mendoza. He has a taxi stand close to where I live. I used to ride his taxi all the time.

Q. Why were you riding his taxi all the time?

A. I wasn't going to walk. It's on the corner.

Mr. Richardson: I object to it. Why does anybody ride a taxi?

Mr. Soares: It's not why anybody rides. It's why this girl rides. It's cross-examination of a denial that she has been practicing her prostitution.

Mr. Richardson: Riding a cab doesn't prove prostitution.

Mr. Soares: But every prostitute that practices prostitution [32] rides a cab.

Mr. Richardson: If your Honor please, we say it is completely immaterial to the issues here.

The Court: I can't see the materiality.

Mr. Soares: I'd like to make an offer of proof, if your Honor please. Well, it is difficult on the reporter, I suppose. It wouldn't take me two minutes to say it, to make the offer.

The Court: I think that we had better let the jury be excused, then.

Mr. Soares: You want to let the jury go?

(Testimony of Sarah Lee Wright.)

The Court: Yes. You may be excused until called.

(Jury leaves courtroom at 2:05 p.m.)

Mr. Soares: I think the witness ought to be excused, too.

The Court: I don't follow you there.

Mr. Soares: I don't think the witness ought to hear what we propose to prove so that she can be prepared to deny it.

Mr. Richardson: If your Honor please, he is going to have to prove it by this witness. He is making an offer now. I never heard of a witness being excused on an offer of proof.

Mr. Soares: Well, I have seen it done a thousand times if it is done once, particularly where the offer comes with an adverse witness. I will have to make certain statements——

The Court: She is not an adverse witness. You haven't [33] made this witness your witness.

Mr. Soares: Well, she certainly is adverse to our side of the case.

The Court: Well, that doesn't make her an adverse witness.

Mr. Soares: Well, maybe the expression was unhappy, but she is adverse to our side of the case. She certainly is not helping us. I will make a formal motion that the witness be excused while I make an offer of proof.

The Court: Denied.

Mr. Soares: Save an exception. I offer to prove,

(Testimony of Sarah Lee Wright.)

if the Court please, that the persons heretofore named, and others whom I shall name in other questions, have been what are known in the underworld as "hustlers" for this girl in the practice of prostitution right down to date, from the time she left the Miner Lii home to this date. They include Mendoza, Chico Takashima, Charlie D. Young, Jerry Sugitama.

The Court: You haven't mentioned these heretofore.

Mr. Soares: This is an offer of proof. I mentioned one name because it was including each in a separate question.

The Court: You are making an offer of proof here before you have made any attempt to prove——

Mr. Richardson: The question concerned a taxicab. That's how the thing came up.

Mr. Soares: We asked her if she knew Mendoza, and she [34] hemmed and hawed about it.

The Court: Well, you discussed the name of Alexander Mendoza, and she said she knew a Mendoza.

Mr. Soares: Finally she said that and volunteered that she rode a taxi with him.

The Court: Yes.

Mr. Soares: And then we asked her why she rode the taxi. And I think that's the question to which they objected. And we are showing that she not only rode the taxi with him, but because he was going to deliver her to a customer.

The Witness: That isn't true. He is on the

(Testimony of Sarah Lee Wright.)

corner from my house. He used to drop me to a show once in a while, But he never delivered me nowhere.

The Court: Well, you keep out of it. You will get your chance later.

Mr. Soares: Well, that's the offer of proof, that these people have all hustled for her. In other words, they have procured for her. And this question is primarily, is preliminary to that situation.

Mr. Richardson: If your Honor please, he is not offering to prove anything. Mr. Soares here is making a statement.

Mr. Soares: I am saying in exact terms that I offer to prove by this witness, if she tells the truth, that these people have procured for her.

Mr. Richardson: I object to that "if she tells the truth." [35] He can cross-examine this witness if he wants to.

Mr. Soares: Well, I don't know——

The Court: For my part, I can't see whether the fact that she has continued in prostitution has anything to do with her credibility.

Mr. Soares: In other words, an admitted prostitute——

The Court: Is a credible witness.

Mr. Soares: ——is as credible as one who is a virtuous one?

The Court: We are drawing no comparison.

Mr. Soares: But we will when the proper time comes, if the Court please.

The Court: You may, as a matter of argument.

(Testimony of Sarah Lee Wright.)

Mr. Soares: And we have to argue only on a matter that is in evidence. And we certainly can show, if under no other authority, under the case what her morals are, so that the jury can determine her credibility.

The Court: She has already admitted her morals. That was before the jury.

Mr. Soares: Not in this particular connection. She has denied—she now attempts to present herself to the jury as a reformed prostitute. Now she says——

The Court: I haven't drawn that from it.

Mr. Soares: Pardon?

The Court: I haven't drawn that from her. The mere fact [36] that there may be a lull in her occupation——

Mr. Soares: That is one inference. Your Honor suggests that there is a lull. But she hasn't suggested that she gave up, and to take it up again.

The Court: Yes, I know, but I can't allow you to go ahead on just suppositions.

Mr. Soares: They aren't suppositions, if the Court please.

The Court: And conjectures. Now, she has admitted that she has been in the prostitution business. That's what she came here for. And she worked at that.

Mr. Soares: And that she stopped.

The Court: And she stopped.

Mr. Soares: Now, we want to show that she hasn't stopped.

(Testimony of Sarah Lee Wright.)

The Court: Well, she isn't prostituting just now. She isn't prostituting just now. She must have stopped.

Mr. Soares: She said she hasn't practiced it since she left Miner Lii's home.

The Court: Did you say that?

The Witness: Yes, sir.

Mr. Soares: That's why we are going into all this, to show that not only is she falsifying about that but that she is at the moment a confirmed prostitute and not worthy of credence.

The Court: That doesn't follow.

Mr. Soares: Pardon? [37]

The Court: That doesn't follow.

Mr. Soares: It doesn't follow absolutely but it is certainly a circumstance for the jury to have in mind while they are testing her credibility.

The Court: Well, go ahead with your offer of proof.

Mr. Soares: Well, briefly stated I offer to prove that she has continued to practice prostitution since she left the Miner Lii home on her own testimony, contrary to her evidence that she stopped it. And I expect to elicit that by asking these questions with reference to her relations with these different men.

The Court: Well, you are making an attempt, it seems to me, to twist this trial into a trial of a witness as to whether she is a practicing prostitute or not. I can't do that.

Mr. Soares: I am simply bringing before the jury the immoral character of this witness at the

(Testimony of Sarah Lee Wright.)

time that she is testifying so that they can judge of her credibility when the times comes for them to do that. And I think that the books are full of authorities for proving the moral character of a witness, moral conduct of a witness. The case that I recalled to mind because it is the most prominent one is the case.

The Court: You will have to prove that by some facts. You can't prove it by suspicion.

Mr. Soares: But we can't prove it all at one time, if [38] the Court please. This is the witness who knows best whether she is still practicing prostitution or not. And we are first trying to get it from her. And that is the question that is now before the Court. If she admits it, then, of course, the Court probably would not permit other evidence as being accumulative. If she denies it, I submit we still have the right to prove it so that the jury may have her character before it.

Mr. Richardson: If your Honor please, she admits that she has practiced prostitution. I object to this line of questioning on the further ground that what happened after she left Miner Lii's place isn't material at all here. These people are charged with an offense that occurred in October last year. After she came out here and worked as a prostitute—what happened later on when she left couldn't be material in this lawsuit.

The Court: Well, I am asking the witness now. Do you admit or deny that you practiced prostitution since you left the Lii's place?

(Testimony of Sarah Lee Wright.)

The Witness: I have not practiced prostitution.

The Court: All right. The witness says she has not. Do you wish to prove to the contrary?

Mr. Soares: Yes, if the Court please. And I want to cross-examine her on that statement.

The Court: All right. Call the jury in.

(Jury returns to the courtroom at 2:16 [39] p.m.)

The Court: The jury is in the box. The witness denies that she has practiced prostitution since she left the household of the Liis. Counsel for the defense wants to cross-examine her on that matter, and he may proceed.

Q. (By Mr. Soares): Have you ever left the Island of Oahu since you came here in October?

A. Yes.

Q. And where did you go? A. To Maui.

Q. Did you go to any other of the islands than Maui? A. No, sir.

Q. Weren't you on the Island of Kauai?

A. No, sir.

Q. And how many times have you been on the Island of Maui since October?

A. Since October?

Q. What's that?

A. I don't know the month I was over there.

The Court: Since October was the question.

A. I was only there only one time.

Q. Only once? A. Yes.

Q. And how long did you stay there?

(Testimony of Sarah Lee Wright.)

A. Two days. [40]

Q. And where did you stay?

A. With a friend.

Q. What are their names?

A. I forgot his name.

Q. What's that? A. I forgot his name.

Q. You forgot his name? A. Yes.

Q. In what town did you stay?

A. I don't know that. I was only there—I wasn't there long enough to find out.

Q. You what?

A. I wasn't there long enough. It was close to the airport.

Q. Close to the airport? A. Yes.

Q. Was it a plantation camp, do you know?

A. No, it was downtown in a very old Chinaman's house. A very old Chinaman lived there.

Q. And did a young Chinaman take you to Maui? A. No, he was already there.

Q. Who was already there?

A. A friend of mine.

Q. What's his name?

A. I asked him if he was going to go over. [41]

Q. What's the name of this friend of yours who was already there? A. Just a friend.

Q. What's that? A. It's just a friend.

Q. What's his name?

A. Do I have to answer that?

Q. Yes, I think so.

Mr. Richardson: I except, if the Court please.

Mr. Soares: She asked me.

(Testimony of Sarah Lee Wright.)

The Court: Answer it.

A. His name is Lum.

Q. (By Mr. Soares): And do you know his full name? A. No, sir.

Q. You know him only by the name of Lum?

A. Yes.

Q. Have you ever heard him called Lee Lum?

A. No.

Q. Who paid for your transportation to go to Maui? A. Myself.

Q. And when was it?

A. When did I go?

Q. Yes, when did you go?

A. I don't remember.

Q. How long ago? [42]

A. A long time ago.

Q. Can't you give us some idea whether it was a week, a month, six months?

A. It's been months.

Q. What's that? A. It's been months.

Q. And how did you go? A. I flew.

Q. What airline?

A. I don't remember the name.

Q. Where did you get the plane?

A. Honolulu. At the airport.

Q. The same airport that you landed from San Francisco? A. Yes.

Q. That's where you got the plane, from the same terminal? A. Yes.

Q. Do you know whether it was the Aloha Airlines?

Mr. Richardson: If your Honor please, what

(Testimony of Sarah Lee Wright.)

possible difference does it make what airlines she took to go there?

Mr. Soares: I can tell Counsel. Maybe if I tell Counsel what I expect to show, he can see the reason.

The Court: We will save more time by going through it.

Q. (By Mr. Soares): Was it the Aloha Airlines? [43] A. I think so. I am not sure.

Q. Can you tell us what month of the year it was? A. No, sir.

Q. Did anyone accompany you?

A. No, sir.

Q. Was it before or after you had been picked up by Shaffer? A. Before.

Q. Can you give us any idea how long before?

A. No, sir.

Q. This man Lum who you say was already over there, how long have you known him?

A. Ever since I left Mr. and Mrs. Lii's house.

Q. Since you left them? A. Yes.

Q. Do you know what his business is?

A. No.

Q. Have you seen him a few or many times since you left Lii's house?

A. Since I came back from over there? You mean since I came back from the other islands?

Q. No, altogether in your lifetime, have you seen him few or many times?

A. Not too many times.

Q. Well, about how many times? [44]

(Testimony of Sarah Lee Wright.)

A. Oh, gee, I don't know. I'd say every other time I'd go downtown.

Q. Do you know where he lives?

A. No, sir.

Q. Do you know anything about him at all?

A. I know he is always nice to me.

Q. That's all you know about him?

A. That's all I know.

Q. Did he give you money? A. No, sir.

Q. Do you know what his business is?

A. No, sir.

Q. Were you in his company very much?

A. Well, just to sit and talk like we, when we are sitting, like that.

Q. Well, I say, very much? A. Yes.

Q. Nearly every day? A. No.

Q. When you left the Lii home, where did you go to live?

A. 148 Nana Way. Nana, Nano, N-a-n-o, Way.

Q. And what part of town is that?

A. Waikiki.

Q. And how did you happen to go there? [45]

A. That's when I left Lii's house.

Q. What's that?

A. That's when I moved out of Lii's house.

Q. I say, how did you happen to pick this particular place?

A. I was looking for an apartment.

Q. And how did you find this?

A. In the paper.

Q. Is it an apartment house? A. Yes.

(Testimony of Sarah Lee Wright.)

Q. And you had an apartment of your own?

A. Yes.

Q. How much did it cost you?

A. Ninety-five.

Q. Ninety-five dollars a month? A. Yes.

Q. And where did you get the money?

A. I was sharing it.

Q. What's that?

A. Where did I get the money?

Q. Yes.

A. Well, I had a lot of it when I left Lii's house.

Q. What's that?

A. I had some of it when I left Lii's house.

Mr. Soares: May I have that? [46]

(The reporter read the last answer.)

Q. And are you living there now?

A. Yes.

Q. You are still living there? A. Yes.

Q. And you have been living there how long now?

A. Let's see—I moved out one month and I came back.

Q. You moved out one month from where?

A. From where I am living now. I don't know. I have been living there ever since I left his house. How many months is that? It's about six, seven months, six months.

Q. Is \$95 just the rent or does that include your food? A. My what?

Q. Does that include your food and other requirements or is it just rent? A. Just rent.

(Testimony of Sarah Lee Wright.)

Q. And how much have you been paying for your support outside of rent?

A. I don't know.

Q. Don't you know what it costs you to live?

A. Well, I mean I don't keep it marked down. I don't know.

Q. Have you any idea?

A. About five—oh, according to if I go to the show or not. [47]

Q. We will say on an average what do you spend for your upkeep either by the day, week or month?

A. I don't even know.

Q. You haven't any idea at all? A. No.

Q. You pay for your own upkeep, don't you?

A. Yes.

Q. Nobody is keeping you? A. No.

Q. It is your own money? A. Yes.

Q. And you don't know how much you spend a day to live on?

A. Oh, I'd say about three, four, five dollars. Not that much anyhow.

Q. Have you sent any money home?

A. I sent some when I was at Lii's house.

Q. What's that?

A. I sent some when I was at Lii's house.

Q. But since you left Lii's house?

A. No.

Q. Now, you say you were at Lii's house about seven weeks? A. Yes, sir.

Q. And you got there about the middle of October? [48] A. The ninth of October.

(Testimony of Sarah Lee Wright.)

Q. What's that? A. The ninth of October.

Q. The ninth of October? And you left before the end of November?

A. It was right before Thanksgiving.

Q. What's that?

A. It was around Thanksgiving.

Q. And you then have been living at 148 Nano Way from the end of November to the present time?

A. Yes, except one month.

—Q. And where did you live that month?

A. Isenberg.

Q. What's that? A. Isenberg.

Q. Do you know the number there?

A. 606.

Q. What's that? A. 606.

Q. Who else was living there? Who else was living there while you were living there, if anyone?

A. I was living by myself.

Q. What's that? A. By myself.

Q. What kind of a place is 606 Isenberg, a cottage, [59] apartment or what?

A. It's just a house by itself.

Q. A complete house? A. Yes.

Q. How many rooms?

A. Well, you've got two downstairs and four upstairs.

Q. Two downstairs and four upstairs?

A. Yes.

Q. You rented a 2-story house on Isenberg Road to live by yourself?

A. I was going to live by myself.

(Testimony of Sarah Lee Wright.)

Q. What's that?

A. I wasn't going to live by myself when I got it.

Q. Who was going to live with you?

A. The girl friend who was sharing the apartment.

Q. What's her name?

A. Do I have to give her name?

The Court: Oh, yes.

A. Betty Evans, Mrs. Evans.

Q. Babe? A. Betty Evans.

Q. Where is Betty Evans now?

A. She went to the mainland three days ago to see her husband.

Q. While she was living with you in the apartment, [50] what was her business?

A. She was working for a while as a taxi dancer.

Q. She wasn't prostituting? A. No.

Q. You know that? A. Yes.

Q. How much rent did you have to pay for this 2-story, 5-bedroom house?

A. One hundred twenty.

Q. A month? A. Yes.

Q. Was there any reason for your leaving the \$95 apartment to go into \$120, into a \$120 house?

A. Yes, we were going to share it because it had a bigger place for the baby and it wasn't as dusty as the other place.

Q. Who found the place on Isenberg for you?

A. I found it myself.

Q. How did you find it?

A. I went looking.

(Testimony of Sarah Lee Wright.)

Q. What is the name of the apartment house on Nano Road, if it does have a name?

A. It hasn't got a name.

Q. Now, since you left Miner Lii's home, have you lived anywhere else except at 148 Nano Road and 606 Isenberg? [51]

A. Yes, because right after we left this house we stayed about two or three days in a hotel. I stayed there.

—Q. Well, now, I understood you to say "we." Did you mean that or did you go alone?

A. Myself. Was it the Queen's Hotel, next to the hospital?

Q. What's that? A. Queen's Hotel.

Q. The Queen's Hotel?

A. I think that's it. Next to the hospital.

Q. You moved from Miner Lii's to the Queen's Hotel? A. Yes.

Q. And stayed there three days?

A. Yes, something like that.

Q. And then went to 148 Nano? A. Yes.

Q. And how long did you stay at Nano Road before you went to Isenberg?

A. About three, four months.

Q. What's that?

A. Three or four months.

Q. And then you went to 606 Isenberg and stayed there one month? A. Yes.

Q. And then you went back to 148 Nano? [52]

A. Yes.

Q. And stayed there up to the present time?

(Testimony of Sarah Lee Wright.)

A. Yes.

Q. You haven't lived in any other places?

A. No, sir.

Q. Do you know the Comstock apartment hotel?

A. No, sir.

Q. That is 313 Royal Hawaiian Avenue?

A. No, sir.

Q. Do you know anybody by the name of Louis?

The Court: Well, now, this is not cross-examination.

Mr. Soares: It goes to her credibility and what she has been doing, if the Court please, and it is in connection with her trip to one of the other islands.

Mr. Richardson: If your Honor please, I don't want to keep objecting all the time. I understood that the Court ruled that he could proceed on this line of questioning. I want to make a general objection to this entire line of questioning for the reason that anything that happened after she left the Liis is not material here at all. What these Defendants are charged with occurred in October of last year, and what happened after she left the Liis we say is not material in any sense.

Mr. Soares: We say it is material as to her credibility and to assist the jury in judging her incredibility, if the [53] Court please. It is in connection with part of the things that I said while the jury was absent as to the offer of proof. And this particular name is tied up.

The Court: You may go ahead with that, but

(Testimony of Sarah Lee Wright.)

you are going so far afield that it is just simply killing time.

Mr. Soares: If the Court please, we are confronted with a witness who already has shown herself to be wise far beyond her years and has shown herself——

The Court: You are making an argument here now.

Mr. Soares: Of course, I am making an argument. I am trying to argue, to show to your Honor why this question is material. One just doesn't make a statement without supporting it by argument.

The Court: Now, what is it that you are trying to get at now?

Mr. Soares: I am trying—this name should call her attention to circumstances under which she travelled to the other islands, if the Court please.

The Court: Well, she admits going to Maui one time.

Mr. Soares: Well, we are not accepting that as final, if the Court please, by any manner or means.

The Court: Then put your finger on something; if you want to show that she went to another island, call her attention to it.

Mr. Soares: Well, this is the first finger of the hand [54] that we are putting on her, and we expect, if permitted, to close the grasp on her to show that she hasn't been telling the truth and that she has been practicing prostitution——

Mr. Richardson: If Mr. Soares wants to argue this thing, let the jury step out.

(Testimony of Sarah Lee Wright.)

Mr. Soares: We have to have something to argue on, and we have to have testimony.

The Court: What is your question now?

(The reporter read the last question.)

A. No, I don't.

The Court: Well, now, there are just so many Louises in the world or people of that name that that is not a fair question unless——

Mr. Soares: Well, I except to the Court's remarks to the question as "unfair," especially after it has been answered.

The Court: I am characterizing the question that you asked, the nature of it.

Mr. Soares: And I take exception to the Court's characterization of that question in the presence of the jury, for we insist that it is wholly unfounded. We cannot—that is the only name we know this man by.

The Court: Well, why don't you identify the man in some other way, then?

Mr. Soares: Well, I can only ask one question at a time.

The Court: You asked for a person named [55] Louis.

Mr. Soares: Yes.

The Court: Well, without any identification as to what Louis. I remarked that there are so many people in the world named Louis that I should doubt if anyone in this room who doesn't know someone named Louis.

(Testimony of Sarah Lee Wright.)

Mr. Soares: Except the witness. She doesn't. She has already said she doesn't. But, if the Court please, the necessity for this question is illustrated by what happened in connection with Lum. I asked her if she knew a man by the name of Lee Lum, and she flatly said no. It later developed that she did know a man simply by the name of Lum without any other name. And so, anticipating that she might know a Louis, this Louis, without recognizing his full name, I have simply asked her if she knows Louis by the single name of Louis, in the same manner, whether she knew Lum by the single name of Lum.

The Court: She answered that she didn't. Now, go on from there.

Q. (By Mr. Soares): Were you ever on the Island of Kauai? A. No, sir.

Mr. Richardson: She answered that, if your Honor please. This is going back over this again, time and time again.

The Court: We know that she has answered that before and she said No. That would suffice. [56]

Q. (By Mr. Soares): Have you always gone by the name of Sarah Wright?

A. That is my right name and I have always went by it.

Q. Have you ever used any other name?

A. No, sir.

Q. Haven't you ever gone by the name of Sarah Lee? A. That's my middle name.

(Testimony of Sarah Lee Wright.)

Q. You go by your middle name, just Sarah Lee, rather than Sarah Wright?

A. That's what everybody calls me, Sarah Lee.

Q. I am asking you if you have ever gone——

A. It's my name. I should——

Q. All right. Who got the ticket when you went over to Maui? A. I did.

Q. And did you go under the name of Sarah Wright? A. Yes.

Q. Or Sarah Lee Wright?

A. I don't remember.

Q. And where did you get the ticket?

A. The airport.

Q. Didn't you know anybody else who was on that plane?

A. I didn't know anyone on that plane.

Q. Did Lum meet you at the airport over on Maui? A. Yes, because I asked him to. [57]

Q. When did you ask him to?

A. Oh, I asked him about—a long time ago, because, see, I was figuring on going back home and I asked him if he ever went to the other islands to let me know; I'd like to see the other islands before I go home. So he told me he was leaving and he just happened to think when he got aboard the plane and he called me early one morning and he said, I'm going over, if you want to go——

Mr. Richardson: Miss Wright, would you speak a little louder? I'm afraid the jury can't hear you.

A. (Continuing): ——so I went over.

Q. (By Mr. Soares): Pardon?

(Testimony of Sarah Lee Wright.)

A. So I went over.

Q. Well, we haven't heard it. Will you repeat loud enough so we can hear it?

A. I told him I had wanted to go see the other islands, and if he ever went to one of the other islands to let me know. So one day he left and called me up and said if I'd like to come, to come over. So I'd like to have a definite day so he could be there to meet me. And I went over.

Q. Where did this conversation take place between you and Lum? A. At first?

Q. Yes, when you told him that you would like to go over some time and to tell you a definite [58] day?

A. I don't remember. It was by telephone or downtown.

Q. And how did you inform him of the time that you were coming over?

A. Well, he was going to go over and I told him I'd come over the next day if he didn't mind.

Q. How did you let him know that you were on the particular plane which he met?

A. I told him I was on it.

Q. How did you tell him?

A. Because he told me he was going to go, so that's when I told him: I want to tell you definitely when I am coming, so I want you to meet me because I don't know anyone over there.

Q. Before Lum went over to Maui he told you he was going? A. Yes.

(Testimony of Sarah Lee Wright.)

Q. Prior to that, you and he had discussed your wanting to go to one of the other islands?

A. I wanted to go to all of the other islands.

Q. But you didn't get around to it?

A. No.

Q. You only went to Maui? A. Yes.

Q. And so he left ahead of you?

A. Yes. [59]

Q. When he left Honolulu, did he know when you were going to Maui?

A. Yes, I told him to watch for me on the next day.

Q. You told him to watch for you on the next day? A. Yes.

Q. So he went the day before you went?

A. Yes.

Q. Did you see him go off? A. No.

Q. Where were you when you told him to watch for you the next day?

Mr. Richardson: If your Honor please, I am forced to object to these questions again. This thing is just not getting us anywhere.

Mr. Soares: From our standpoint we are making pretty good progress, from our viewpoint. Of course, I can't argue the matter now, but it must be unfolding itself. Certainly if counsel were the defense counsel he would understand what we are getting at.

Mr. Richardson: We submit it is all immaterial as to the issues involved here.

Mr. Soares: Well, I submit it is very material to this whole case.

(Testimony of Sarah Lee Wright.)

The Court: Well, you may go ahead for a while. Limit it to cross-examination. [60]

Mr. Soares: May I have the last question?

(The reporter read the last question.)

A. Downtown.

Q. Where at downtown?

A. I think it was Yuki's Cafe?

Q. What cafe? A. Yuki's.

Q. I'd like to know the name of this cafe.

A. Y-u-k-i.

Q. Where is that?

A. The only thing I know is it is next to the Brown Derby.

Q. What's that?

A. The only thing I know, it's the same block, next to the Brown Derby.

Q. You mean to say you have been here since October and you don't know the name of the street in which the Brown Derby and Yuki's Cafe is?

A. I wouldn't swear to that.

Mr. Richardson: A question of that sort doesn't lead up to anything.

Mr. Soares: It does lead up—that this witness is an evasive witness. It is incomprehensible that a girl should have been here since October and not know Nuuanu Avenue as the name of a street where a prominent cafe is, or a night spot, [61] or whatever you may call it, like the Brown Derby, where it is located. I am sure that we have a right to inquire into that.

(Testimony of Sarah Lee Wright.)

Mr. Richardson: If your Honor please, he doesn't know where Yuki's is.

Mr. Soares: Sure, because I don't visit those spots. This lady does.

Mr. Richardson: This is an argument, if your Honor please. We are not getting anywhere on that.

The Court: Go ahead. What was the last question?

(The reporter read the last question and answer.)

Q. (By Mr. Soares): Well, the day that Lum was leaving for Maui, you told him to watch for you the next day, is that right? A. Yes, sir.

Q. Is that all you told him about your going?

A. Yes, sir.

Q. Nothing else? A. No.

Q. Did he tell you what his plans for you were?

A. No.

Q. And you stayed on Maui how long?

A. Two days.

Q. How many? A. Two days. [62]

Q. How many nights? A. Two nights.

Q. Two nights? A. Yes.

Q. And did you stay both those nights at the home of this old Chinaman near the airport?

A. No.

Q. How many nights did you stay there?

A. One.

Q. And where did you stay the other night?

A. In jail.

Q. Where? A. In jail.

(Testimony of Sarah Lee Wright.)

Q. In jail? For what?

A. Suspicion of prostitution.

Q. Did they put any charge against you?

A. No.

Q. Did you put up any bail? A. No.

Q. Did they float you out of town, is that it?

A. Well, yes, I guess they did.

Q. So you were just a tourist who had given up prostitution since October? The first or second day you were on Maui the police pick you up on suspicion of prostitution, is that right? [63]

A. Yes, the people whom I went over there with, they had it in for.

Q. What's that?

A. It was the people that I was over there with that they had it in for, that I didn't know.

Mr. Richardson: Would the Court instruct the witness that when an objection is made, to be quiet. I object to the question on the grounds that it is argumentative.

The Court: Well, I think she was speaking first, and she was explaining the circumstances, I take it.

Q. (By Mr. Soares): Who were these people you were with? A. I told you before.

Q. Who? Tell me again.

A. You mean who I went over there with?

Q. Yes, whom did you go there with?

A. Well, as I told you before, Lum met me over there.

Q. Whom did you go over with?

A. I didn't go over with him. I met him there.

(Testimony of Sarah Lee Wright.)

They don't like him over there. That isn't my fault. And just because I am a haole, they thought that——

Q. No charge was placed against you?

A. No.

Q. Isn't it true that you were charged with prostitution and that bail was put up and that you forfeited bail? [64] A. No.

Q. Where were you picked up?

A. They come and got me out of the old man's house.

Q. What time?

A. Oh, about two o'clock in the afternoon.

Q. What time had you arrived there?

A. I think I got there in the afternoon. I'm not too sure if I left in the morning or evening.

Q. And did they pick you up the same day you arrived? A. No.

Q. Who else, if anyone, was there when they picked you up in the old man's house?

A. With a fellow that met me over there.

Q. What's his name? A. Lum.

Q. Do you know his full name? A. No.

Q. And who else?

A. And the old man who owned the house.

Q. And anybody else? A. No.

Q. Did they pick up anybody else but you, the police, and take you to the police station?

A. Yes.

Q. Who else? [65]

(Testimony of Sarah Lee Wright.)

A. They took them, too.

Q. Who?

A. They took the two men, Lum and the old——

Q. The two men and you? A. Yes.

Q. Do you know whether Lum was charged?

A. No, none of us was charged.

Q. You were kept in jail all night?

A. Yes.

Q. Was Lum kept in jail all night?

—A. Yes.

Q. Who took you to the airplane the next day?

A. The vice squad.

Q. What? A. The man in the vice squad.

Q. They made sure you left the island?

A. No, because they didn't exactly make sure; because they didn't think they had enough room on the plane for us, so they wanted to take us down to be sure.

Q. They weren't trying to make sure you left the island, but they——

A. I guess they were at that, too.

Q. Did Lum come back on that same plane?

A. Yes.

Q. Now, have you been picked up any other time since [66] you left Lii's house? A. No.

Q. And all the time that you lived with Mr. and Mrs. Lii you were never picked up on suspicion of prostitution, were you?

A. How could I? They would hardly let me out of the house, on the sidewalk.

Q. What did they do, chain you?

(Testimony of Sarah Lee Wright.)

A. Almost.

Q. What do you mean by "almost"?

A. I mean, we went downtown, but one of them was awfully close to us.

Q. Well, now, have you ever been in Salinas?

A. California?

Q. Yes, California, or any other Salinas that you know?

A. No, I have never been in Salinas. I think I went through there one time on a bus.

Q. Have you ever been in Stockton?

A. Only through there.

Q. Never stopped over? A. No.

Q. Or on the outskirts? A. No.

Q. Do you know what kind of people live in Salinas? What is the principal work down [67] there? A. No, I don't.

Q. Do you know where the lettuce fields are?

A. Of course not. I went through on a bus.

Mr. Richardson: I object to this, if your Honor please.

The Court: The objection is sustained.

Mr. Soares: Save an exception.

Q. Have you ever been convicted at any time of any offense? A. No, sir.

Q. Never in your life?

A. Never in my life.

Q. Were you ever in New Orleans?

A. I lived there for five years.

Q. You weren't convicted while you were there?

A. I never worked there.

(Testimony of Sarah Lee Wright.)

Q. Where have you ever worked besides Honolulu? A. Right here in Honolulu.

Q. No other place? A. No other place.

Q. You were a virgin when you came to Honolulu? A. Maybe.

Q. Well, tell me frankly whether you were or not? A. No, I wasn't.

The Court: That's objected to. We will take a recess now. [68]

(A short recess was taken.)

Q. (By Mr. Soares): Did I understand you correctly to say that the only people that the police took down when you were picked up in Maui were you, Lum and the old Chinaman? A. Yes, sir.

Q. And the old Chinaman lived at that place, is that right? A. Yes, sir.

Q. Are you sure there was nobody else picked up at the same time? A. No, sir.

Q. Did you meet any Filipino in that house?

A. No.

Q. And would you deny that you had sexual intercourse with a Filipino over on Maui on that occasion?

A. I told them at the police station I did, because I wanted to come back to this island.

Q. You did tell them that you had?

A. Yes.

Q. But you lied?

A. Yes, because otherwise they'd keep me over there longer.

Q. Did they force you? [69] A. No.

(Testimony of Sarah Lee Wright.)

Q. Well, what made you think that if you told the Maui police that you had had sexual intercourse with a Filipino that they would let you go?

A. Because they kept asking me and I kept telling them I wasn't working, which was the truth. They thought I had went to the camps, and I told them I hadn't. So they kept me there that day and that night, and the next day I said, Yes, I did. And then they let me go.

Q. You say they kept you that day and that night? You mean from two o'clock? A. Yes.

Q. And what time did they let you go?

A. The next afternoon.

Q. Next afternoon? Weren't you in court at all?

A. No, sir.

Q. You never were in court of Judge Wong, the District Magistrate of Wailuku? A. No, sir.

Q. And you deny that you pled guilty before Judge Wong in the District Court? Just a minute until you hear the question. You are too anxious to deny. Will you deny that you pled guilty before Judge Wong in his courtroom of the District Court in Wailuku and that you were given a suspended sentence on condition that you would leave [70] Maui? A. No, because I did not go to court.

Q. You didn't go in court at all?

A. The only thing I did was talk to the vice squad.

Q. Did you talk to the prosecutor over there?

A. I talked to some other man. I think he was

(Testimony of Sarah Lee Wright.)

in the vice squad, the chief of vice squad, something like that, but no judge.

Q. But you were never in the courtroom?

A. No, sir.

Q. Did you have a lawyer over there?

A. No, sir.

Q. Did they give you the name of the Filipino that they claimed you had intercourse with?

A. No, sir.

Q. Did you see any Filipino that they claimed you had intercourse with? A. No, sir.

Q. Do you know a man by the name of Harold Lewis? A. Not that I recall.

Q. Who plays in a band, has a band?

A. No.

Q. You say you spent some time at the Queen's Hotel after you left the Miner Lii home?

A. Was that the Queen's?

Q. Didn't you say that? [71]

A. It's next to the hospital. I think the name of it is Queen's.

Q. Isn't that the name you used, Queen's Hotel?

A. Yes, I only spent about three days there.

Q. What? A. Three days.

Q. Two days? A. Two or three.

Mr. Richardson: Just a little bit louder.

The Court: That's all been gone over, Counsel. Don't go over it again.

Q. (By Mr. Soares): Did you register in your own name? A. No, I used someone else's.

Q. Whose name did you use?

(Testimony of Sarah Lee Wright.)

A. Sampson.

Q. Francisco Sampson, Frank Sampson?

A. Frank Sampson.

Q. And you registered as Mr. and Mrs. Frank Sampson? A. Yes.

Q. Who was with you?

A. Well, he was for a while, but not too long.

Q. Who was with you?

A. Frank Sampson.

Q. Do you know a young fellow by the name of Babe? [72] A. That's the same one.

Q. He is going to be a witness in this case, isn't he? That's the same one who has been hanging around here? A. I think so.

Q. Well, didn't you go down the elevator with him?

A. I don't know whether he's going to be a witness or not.

Mr. Richardson: That has nothing to do with this case whether he is going to be a witness. She doesn't know whether he is going to be a witness or not. That's up to me.

Mr. Soares: Well, whom am I arguing with, the witness or counsel?

The Court: Well, you shouldn't be arguing.

Mr. Soares: I am trying to avoid that.

The Court: She says she doesn't know whether he is going to be a witness or not.

Q. (By Mr. Soares): Didn't Mr. Richardson question you and this man that you call Frank Sampson together about the facts of this case?

(Testimony of Sarah Lee Wright.)

A. No.

Mr. Richardson: I object to that, if your Honor please. It is an improper question to ask the witness whether or not the prosecution has interviewed——

Mr. Soares: It would be improper except for the fact [73] that she wouldn't know whether he is going to be a witness or not.

The Court: Well, there is just so much of this so-called cross-examination that it seems to me it is just a sort of a fishing excursion. Counsel, I don't feel that it would be proper to give you any more than ten minutes' additional time to finish your cross-examination.

Mr. Soares: Well, I certainly will expect more than ten minutes, if the Court please. We have only gotten on one phase of her testimony.

The Court: Well, you had better get on another phase, then, if it is of importance to you.

Mr. Soares: Well, I will save an exception to the prejudicial remarks of the Court that I had better do that, this and that, and that it is so-called cross-examination, and that I can have only ten minutes to get on all the other phases. I assign those remarks as error and save an exception.

Q. Did Frank Sampson go by any other name?

A. No.

Q. Is this the same Frank Sampson who you say carried you to the airport? A. Yes.

Q. In San Francisco? A. Yes.

(Testimony of Sarah Lee Wright.)

Q. Do you know a boy by the name of Babe Blanco? [74]

A. That's his stepfather. A lot of people think he's a Blanco, but he isn't. He's Sampson.

Q. Do you know anybody by the name of—who goes by the name of Babe Blanco?

A. I know Babe Sampson. A lot of people think he is a Blanco. He doesn't go by that name.

Q. Have you ever known him to use the name of Babe Blanco? A. No.

Q. I will ask you if he went in the elevator with you this morning after the recess sporting a tie with a great, big initial "B" on it?

A. That's right.

Mr. Richardson: I object to it, your Honor. It doesn't make any difference what sort of a tie he had.

Mr. Soares: After all, circumstantial evidence is as available to the defendants as to the prosecution, and we are laying the foundation for arguing later that this woman is entirely not to be believed in any particular, even on so simple a matter of whether this boy goes by the name of Babe Blanco or not. She tries to avoid all that. It is very material, the circumstances to show that she is not telling the truth in any respect.

Mr. Richardson: I further object to all these remarks in front of the jury. [75]

The Witness: May I explain something?

The Court: Well, you had better proceed with your cross-examination.

(Testimony of Sarah Lee Wright.)

Q. (By Mr. Soares): How long after you came to Honolulu did you meet up with Babe?

A. He came over here not too long after I came.

Q. How long?

A. I don't quite remember.

Q. Can't you give us any idea how long it was before you saw him in Honolulu after he put you on the airplane?

A. I imagine about three weeks.

—Q. At the airport? You were still living at Miner Lii's?

A. Yes.

Q. Now, do you know when it was that you first met Mrs. Lii?

A. In San Francisco.

Q. When was it?

A. The same time I met Mr. Lii.

Q. What's that?

A. The same time I met Mr. Lii, about——

Q. When was it?

A. ——about four days before I come over here in October.

Q. What's that? [76]

A. Around the 5th of October.

Q. And where did you first meet him?

A. In the car.

Q. Whose car?

A. It belonged to some girl that the guy was going with and introduced me to Miner.

Q. Who was driving the car?

A. I think he was. Anyhow, he was behind the wheel when I sat down in it.

(Testimony of Sarah Lee Wright.)

Q. Is that the time you say that you had a coke at the bar and then went out to the car?

A. Yes, sir.

Q. And that was the first time you ever met either one of these people? A. Yes.

Q. Who got to that bar first on that occasion, you or Miner Lii?

A. When I first saw Miner Lii, I was going in the bar. He was coming up the street.

Q. You what? What's the last?

A. I say, when I went up into the bar, he was coming up the street, and I was going in. I don't know if he had been in there before or not.

Q. You walked into the bar ahead of Miner, then?

A. Yes, because that's when I got introduced to him. [77]

Q. Who introduced you? A. A friend.

Q. What's the friend's name?

A. Junior.

Q. What? A. Junior.

Q. Who is Junior? A. Junior Sampson.

Q. Is that Frank Sampson's brother?

A. Yes.

Q. And just what did Junior say to you when he introduced you to Miner Lii?

A. He just said, "This is Miner Lii," and "He wants to talk to you." So I says, "What about?" He says, "Maybe about going to Honolulu."

Q. Junior told you all that?

A. That's what he told me.

(Testimony of Sarah Lee Wright.)

Q. Do you know how Miner Lii knew about you?

A. Well, no. From what Junior told me, he came over there looking for girls to bring back over here.

Q. Was Miner or Mrs. Lii there at the time he told you that? A. No.

Mr. Soares: I move that that be stricken, what Junior is supposed to have told her not in the presence of the [78] Defendants, either of the Defendants.

The Court: It may be stricken.

Q. (By Mr. Soares): So that the first time you met Miner Lii, you had been told that he was looking for girls to come to Honolulu? A. Yes.

Q. And you knew for what purpose?

A. I didn't until I talked to him.

Q. Then Junior introduced you and said, "This is Miner Lii," is that right? A. Yes.

Q. And then, will you give us the conversation and the order in which it occurred from there on?

A. Then I met him. Then I went into the bar after I met Mr. Lii and I was drinking a coke. And Junior come and got me and says——

Q. Never mind what Junior says, unless Miner or Mrs. Lii were there.

A. They wanted to talk to me in the car. So then I went out into the car and I sat down. And so we started to talk.

Q. Where did you sit in the car?

A. In the front seat.

(Testimony of Sarah Lee Wright.)

Q. And who else, if anyone, was in the front seat?

A. Junior Sampson was behind the driver's seat. [79]

Q. Junior Sampson was in the driver's seat?

A. Yes.

Q. Who else?

A. And Mr. and Mrs. Lii was in the back.

Q. Now, will you tell us the conversation that took place in the car, telling us who was speaking and what they said in the order in which it was said?

A. Well, I sat down in the car and so I turned around and I says, "Are you the ones that want to see me?"

Q. Just a little bit louder.

A. And they said, "Yes." So I says—oh, then they said, "Would you like to go to Honolulu?"

Q. They said what?

A. "Would you like to go to Honolulu?" So I said, "Yes, I always wanted to go." So then they told me that they had a house over here where I could work, and they told me how much they were getting, and told me that they had steady business.

Q. They had what?

A. Steady business, all local business, all local business; and told me how they took half; to stay there and eat there and they'd take half the money; and told me what the price and everything was.

Mr. Soares: May I have that last?

(The reporter read the last answer.) [80]

(Testimony of Sarah Lee Wright.)

Q. And what was the price?

A. Twelve dollars.

Q. Twelve dollars, did you say? A. Yes.

Q. Was that all they told you at that time?

A. No. Then I said, well——

Q. No, I mean, is that all that Mr. or Mrs. Lii told you at that time, at that particular part of the conversation?

A. It is the same time that I told them I was broke and I couldn't go, the only reason I couldn't go. And they said, that was quite all right, they'd buy my ticket.

Q. Just a minute, please. After they gave you all these details and told you what the proposition was, you said you were broke and couldn't go, is that right? A. That's right.

Q. And then they said they'd get you the ticket?

A. That's right.

Q. Then what happened?

A. So then I told them I would think it over and let them know in a couple of days.

Q. And was that the end of the conversation then? A. At that present time, yes.

Q. Did you make any arrangements as to where you were to meet them?

A. No. When I left I said, "Between now and then I will [81] probably see you around the bar."

Q. Now, have you told us everything that happened on this first occasion? A. Yes.

Q. Talking about the first day? A. Yes.

Q. Now, when did you meet any of them next?

(Testimony of Sarah Lee Wright.)

A. I saw them the next day in the bar, but we didn't have too much to say.

Q. Did you say anything to either of them?

A. No. "Hello" and that's all.

Q. And then when did you next see them?

A. Oh, then I saw them the next day around the corner in a restaurant, just Alice, and she was asking me if I made up my mind yet, and I told her I'd let her know the next day.

Q. Is that all of the conversation then?

A. That day, yes.

Q. And then when did you next see either of them?

A. The next day I told them I was going to go.

Q. Is that all the conversation you had with them? You told them you were willing to go?

A. Oh, no, the same day I told them I was going to go, she said, she tried to get reservations on this smaller plane.

Q. On what?

A. On a different air company, the cheap kind, the one [82] you have to pay about a hundred.

Q. I can't hear you.

A. I don't know the name of the plane but anyhow I told her to call Pan-American because you can always get Pan-American. That's when we were across the street when we called.

Q. It was across the street, you say.

A. Yes.

Q. You mean across the street to use the telephone, not that the office was across the street?

(Testimony of Sarah Lee Wright.)

A. Yes. No, there was a telephone booth across the street so she went over there.

Q. Who went to the telephone?

A. All three of us.

Q. Who used the telephone? A. Alice.

Q. You say there's a telephone booth? You mean a public booth? A. Yes.

Q. How big a booth was that?

A. It's big enough for both of us.

Q. Is it different from the usual telephone booth in San Francisco?

A. No, but two can get in it.

Q. Is it any different from the usual telephone booth in San Francisco? [83] A. No.

Q. And you both were in the telephone booth?

A. Yes.

Q. Is it one of those affairs where you have to shut the door before the light goes on?

A. I don't recall. We didn't shut the door.

Q. And the light went on?

A. I wouldn't know. No one shut the door.

Q. And how many of you were in that telephone booth then?

A. Alice and I. Miner Lii was standing outside.

Q. So you were right there inside the telephone booth with the doors closed while Alice telephoned?

A. The door was open.

Q. They didn't close it?

A. No, we didn't close the door.

Q. What was it you said just a little while ago about the doors closed?

(Testimony of Sarah Lee Wright.)

The Court: She didn't say that.

Mr. Soares: May I have that?

(The reporter read previous questions and answers referred to.)

Q. (By Mr. Soares): And then Alice in your hearing made arrangements for a ticket by Pan-American? [84] A. Yes.

Q. Did she mention your name over the telephone?

A. Yes. That's why I had to get in the telephone booth real close so I can tell her my name.

Q. She didn't know your name?

A. Not the last name, no.

Q. And how long after that was it that you came to Honolulu?

A. I can't be sure if that was on a Saturday or Sunday she made the reservation.

Q. Well, what I mean is, how many days after the date that she telephoned did you actually get on the plane?

A. Well, that's why I just said I can't remember whether it was Saturday or Sunday that she made the reservation, so I don't remember.

Q. I asked you, what day of the week; one day after you were in the telephone booth?

A. Two days, I suppose.

Q. How many?

A. Two days. I'm not sure.

Q. Two days after that?

A. I'm not sure. One day or two days.

(Testimony of Sarah Lee Wright.)

Q. It may have been the next day?

A. It could have been; it could have been two days.

Q. It wasn't more than two days? [85]

A. No.

Q. Now, I understood you to say in answer to Mr. Richardson's questions that you were going to stay with Mr. and Mrs. Lii in their home?

A. Yes.

Q. That was the arrangement? A. Yes.

Q. Did you inquire about them, where their home was, or anything about it?

A. They just said "Honolulu."

Q. They didn't tell you what part of town or the address or anything? A. No.

Q. Now, who occupied the seat with you on the plane coming over? A. Well, no one.

Q. Did Mr. and Mrs. Lii sit next to each other?

A. Yes.

Q. On the plane? Was there anybody else on that plane whom you knew?

A. Only my girl friend Mary Chang.

Q. How long had you known Mary Chang?

A. About six months.

Q. What? A. About six months. [86]

Q. Did you tell her you were coming over to Honolulu? A. Well, yes.

Q. When did you first tell Mary Chang you were coming to Honolulu?

A. When I let Mr. and Mrs. Lii know.

(Testimony of Sarah Lee Wright.)

Q. Was she there at the same time or did you have to look her up?

A. Oh, no. She came over to my house before—she came over to my house about every day and she stayed all night in my house once in a while.

Q. You have been good friends? A. Yes.

Q. Do you owe her some money? A. No.

Q. Did Mary go down to the airport in the same car that you went down? A. Yes.

Q. Did you know that Mary was coming to Honolulu before you saw her on the plane?

A. Well, she wasn't supposed to go.

Q. So you didn't know before you saw her on the plane, is that right?

A. I knew when they bought her ticket that she was going.

Q. Was that the same day that they bought your ticket? [87]

A. I don't know. They called up and got my ticket, and they went down and picked it up. I wasn't with them then. They bought her ticket just when the plane was getting ready to leave.

Q. So she hadn't told you she was coming to Honolulu?

A. She didn't mention, she didn't think she was coming.

Q. What?

A. She didn't think she was coming.

Mr. Soares: No further questions.

Mr. Richardson: That's all, Miss Wright.

The Court: You are excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Richardson: Call Mr. Velazquez.

EDWARD GEORGE VELAZQUEZ

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you state your full name, please, sir?

A. Edward George Velazquez, V-e-l-a-z-q-u-e-z.

Q. Mr. Velazquez, what position do you hold?

A. I am senior cashier for Pan-American Airways in San Francisco. [88]

Q. In the San Francisco office? A. Yes.

Q. Mr. Velazquez, will you tell the Court and gentlemen of the jury what procedure is used when tickets are purchased there at your office, and what forms are in general use there?

A. The general procedure when a ticket is purchased at the district sales office in San Francisco is as follows: The passenger or the purchaser will give the clerk at the counter his sum of money to pay for the ticket, and the clerk at the counter will send it to the cashier in a pneumatic tube system. The cashier then receives the money, makes the change, and sends it back to the clerk at the counter.

Q. Does the cashier make a notation when they

(Testimony of Edward George Velazquez.)

receive money showing that money received for certain tickets?

A. Every cash transaction is accompanied by what we call a cash slip. This cash slip states on it how much cash has been received and the amount of the sale and whether any change is due, and the cashier who has concluded the sale then puts his initials on the cash slips and makes other pertinent remarks.

Q. Now, Mr. Velazquez, when a passenger buys a ticket, does the clerk who actually issues the ticket, do they put the name of the passenger on the ticket? A. That's correct, they do.

Q. And, then, is a portion of the ticket given to the [89] passenger?

A. The Pan-American ticket is composed of several sections, one of them being what is commonly referred to as the flight coupon. The flight coupon and the cover of the ticket are given to the passenger. There are also carbonized portions to that ticket, one of them being an auditor's coupon; another being a clearance house coupon; and a third being an agent's coupon, which is the file copy for our office.

Q. And the original of the ticket, you say that is made out in several sections to the passenger, is that correct? A. That's correct.

Q. Mr. Velazquez, I will hand you two carbon copies of tickets and ask you if you can identify those?

A. I have two agent's coupons here which are

(Testimony of Edward George Velazquez.)

the carbonized coupons of the tickets, form 261P-463792 and 261P-463793.

Q. Now, you are reading the serial numbers on the tickets, are you not?

A. Those are the accountable serial numbers on those tickets. Those are in sequence.

Q. Does one follow right after the other?

A. That's correct.

Q. Does that indicate to you that those tickets were sold at the same time? [90]

A. The presumption would be in that case because there is also a validation stamp on these tickets, the validation date being October 7th for the two of them.

Q. Now, what names do those tickets show for the passengers who travelled on them?

A. Ticket 261P-463792 shows the name of Miner Lii and Alice Lii, and ticket 261P-463793 shows the name of Sarah Lee Wright.

Q. What date do those tickets bear?

A. They bear the validation date of October 7th.

Q. Does that mean the date the tickets were purchased?

A. That means the date on which the tickets were made out.

Q. Were made out?

A. Not necessarily purchased. The cash slip which accompanies this has the date on which they were purchased.

Q. Now, Mr. Velazquez, you can identify these two pieces of paper as being carbon copies of cou-

(Testimony of Edward George Velazquez.)

pons that are used by the Pan-American office?

A. That's correct, sir.

(Mr. Richardson hands the two papers referred to to Mr. Soares.)

Mr. Richardson: If your Honor please, I wish to offer in evidence two carbon copies of the tickets.

Mr. Soares: No objection. [91]

The Court: Received.

The Clerk: Plaintiff's Exhibits A-1 and A-2.

(The documents referred to were received in evidence as Plaintiff's Exhibits A-1 and A-2.)

Q. (By Mr. Richardson): And, Mr. Velazquez, I also hand you another piece of paper and ask if you can identify it, and if so, just explain to the jury what it is.

A. This is a form which we use locally in the San Francisco district sales office, and we refer to it as a cash slip. This form is used in consummating a sale. And it contains information as to the amount of money received, the amount of money involved in the sale, and also whether any change was made. In addition to that, it contains the names of the passengers appearing on the tickets which accompanied this cash slip. And it also contains the ticket numbers as well as the value. In addition to that, it also has the notation by the cashier who received the transaction as to the date and also his initials and the type of payment made.

(Testimony of Edward George Velazquez.)

Q. Now, that particular slip that you have there, does that cover the two tickets that you just examined, the same names?

A. This slip has the same names, those of Miner Lii and Alice Lii and Sarah Lee Wright, and also the two ticket numbers corresponding to those which you just handed to me. [92]

Q. The same serial numbers on the tickets?

A. That's right.

Q. What is the total amount of money that shows was derived from that sale?

A. Well, we show in this cash slip that our counter clerk and subsequently the cashier received \$560, and the sale itself was for \$552. Therefore, change of \$8 was made.

Q. Now, how was that money paid to Pan-American?

A. According to the notation made on this by the receiving cashier, \$450 of the \$560 received was in traveler's checks and the remainder was in cash, cash, either currency or coin.

Q. Four hundred fifty was in traveler's checks and the remainder in cash?

A. That's correct.

Q. From your experience with the records and your experience in your job, Mr. Velazquez, would you say that on this particular sale that that amount of money was paid all by the same person, or could you tell——

Mr. Soares: We object to that conclusion by the witness as not justified.

(Testimony of Edward George Velazquez.)

The Court: Sustained.

Q. (By Mr. Richardson): You do identify this slip as being part of the records in use by Pan-American? [93]

A. That's correct, sir.

(Mr. Richardson hands paper referred to to Mr. Soares.)

Mr. Richardson: If your Honor please, I wish to offer in evidence this slip.

Mr. Soares: We have no objection to the one slip identified by the witness.

Mr. Richardson: There are some others involved in other cases.

The Court: Received.

The Clerk: Plaintiff's Exhibit B.

(The document referred to was received in evidence as Plaintiff's Exhibit B.)

Cross-Examination

By Mr. Soares:

Q. Did you bring with you any of the other records of the Pan-American?

A. No, sir, those are the only records I brought with me.

Q. Are you familiar with any record pertaining to a person by the name of Mary Chang?

A. I'm sorry, I didn't get the question.

Q. Are you familiar with any records pertaining to a person by the name of Mary Chang?

A. Mary Chang? No, I am not.

Q. You weren't asked to look that up? [94]

(Testimony of Edward George Velazquez.)

A. No.

Q. So you wouldn't be able to tell whether Mary Chang was on the plane, was a passenger on that same plane or had a ticket on that same plane or not, would you?

A. Not offhand, I wouldn't say.

Q. Back in San Francisco you could?

A. Well, it all depends on whether she purchased a ticket or not.

Mr. Soares: All right. No further questions.

Mr. Richardson: That's all, Mr. Velazquez. Thank you very much.

(Witness excused.)

Mr. Richardson: Call Frank Sampson.

FRANK SAMPSON

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Mr. Sampson, will you state your full name to the Court, please? A. Frank Sampson.

Q. What kind of work do you do, Mr. Sampson?

A. I am a merchant seaman.

Q. Merchant seaman? A. Yes. [95]

Q. Now, do you know the Defendants in this case, Miner Lii and Alice Lii? A. Yes, I do.

Q. How long have you known them?

A. I have known Miner Lii for about ten years.

(Testimony of Frank Sampson.)

Q. Where is your home, Mr. Sampson, in San Francisco? A. San Francisco.

Q. Where did you know Miner Lii?

A. Where?

Q. In San Francisco? A. Yes, I did.

Q. And do you know Sarah Lee Wright?

A. Yes, I do.

Q. How long have you known her?

A. Since August, 1950.

Q. August of 1950? Where did you meet Sarah?

A. At my dad's establishment, which is a bar.

Q. That is in San Francisco?

A. San Francisco.

Q. Now, Mr. Sampson, I will ask you with reference to some time around the first part of October of last year, did you see Sarah Lee Wright and Miner and Alice Lii together?

A. Yes, I did.

Q. Where was that?

A. In my dad's bar. [96]

Q. What is the name of your father's bar?

A. Blanco's Tavern.

Q. Do you remember the date that you saw them there together? A. No, I don't.

Q. At any rate, you knew them all? You know both the Liis and Miss Wright?

A. That's right.

Q. Did you have a conversation there with them? A. No, I didn't.

Q. Did you, either that day or within the next few days—were you present when a conversation

(Testimony of Frank Sampson.)

was had between the Defendants, Miner and Alice Lii and Sarah Lee Wright, with reference to coming to Honolulu?

A. No, I didn't hear anything about that until, I guess, a couple of days before they left San Francisco.

Q. A couple of days before they left? Well, did you hear something about it then?

A. Oh, yes.

Q. Well, now, what did you hear? Who did you hear it from?

A. I heard it from Mr. and Mrs. Lii. They were talking about going to Honolulu, if she would like to go for a vacation to Honolulu.

Q. Well, now, who was going? [97]

A. Say that again.

(The reporter read the last question.)

Q. Well, you heard them all talking there together about coming to Honolulu, is that correct?

A. Yes, at that time, yes.

Q. And did you know whether or not Sarah was going to come with Lii?

A. No, she didn't—she was—she said that she didn't know whether she was going to go or not.

Q. She didn't know whether she was going to go or not? A. That's right.

Q. Later on did she ever change her mind?

Mr. Soares: We object to that as calling for a conclusion of the witness. No time or place is fixed.

Q. (By Mr. Richardson): Did she say anything further to you about going after that?

(Testimony of Frank Sampson.)

A. No, she didn't.

Q. Now, on Monday, October 7th, did you take Miner Lii and Alice Lii and Miss Wright to the airport?

A. Yes, I did.

Q. How did that come about? How did you happen to take them out there?

A. Well, I told them previous that I would take them to the airport when he's ready to leave. [98]

Q. You told who?

A. Mr. Lii. Seeing that he was a friend of my dad's and friend of mine for some time, to show him the hospitality of San Francisco.

Q. What time did you take them there? What time of the day was it?

A. It was in the morning. He had to be there by nine o'clock.

Q. Who all went to the airport with you?

A. Mr. and Mrs. Lii and Miss Wright and a girl named Mary.

Q. A girl named Mary? A. That's right.

Q. Do you know her last name?

A. No, I don't.

Q. Did you go to the airport in your car?

A. Yes, they did.

Q. Did you see them get aboard the plane there?

A. No, I didn't.

Q. You just took them to the airport and then left, is that right? A. That's right.

Q. Did you hear the flight called for the plane to leave the airport?

A. Yes, I did. That's at the time I left. [99]

(Testimony of Frank Sampson.)

Q. That's the time you left? A. Yes.

Q. They announced over the loudspeaker system that the flight was going out? A. Yes.

Q. Now, have you been back over here, Mr. Sampson, since you took them to the airport last October? A. Yes, I have.

Q. Where did you stay while you were here?

A. At Mr. Lii's place.

Mr. Soares: I didn't hear.

(The reporter read the last answer.)

Q. (By Mr. Richardson): Was Sarah Lee Wright staying there at the time you were here?

A. Yes, she was.

Q. How long did you stay here?

A. Three weeks.

Q. Did you stay at the Lii's place the entire three weeks? A. Yes, I did.

Q. And was she there for the entire three weeks, too? A. Yes, she was.

Mr. Richardson: That's all. [100]

Cross-Examination

By Mr. Soares:

Q. On how many different occasions did you see Miner Lii in San Francisco in the first part of October last year? A. Just the first time.

Q. Only once, you mean?

A. Yes, that's all, once.

Q. And that was at your dad's bar?

A. That's right.

(Testimony of Frank Sampson.)

Q. Did you talk to him then?

A. Oh, yes, I did.

Q. Was anybody with you?

A. Not at the present, no. His wife came about an hour later, I believe.

Q. Were he and you drinking at the bar?

A. He doesn't drink.

Q. Miner Lii doesn't drink?

A. He doesn't drink.

Q. Well, while you were there with him, was anybody else there, or the two of you?

A. No, there wasn't.

Q. Just the two of you alone? A. Yes.

Q. How long has it been since you have seen Miner before that? A. Since 1944. [101]

Q. And where had you seen him then?

A. I run into him then at Waikiki beach.

Q. Here in Honolulu? A. In Honolulu.

Q. Were you shipmates at any time?

A. No, we weren't.

Q. What was your last ship?

A. The Pierre Marquette.

Q. And when was that?

A. From the 21st of April to May 15th.

Q. This year? A. This year.

Q. You say you stayed at Miner Lii's place?

A. I did.

Q. For about three weeks?

A. About three weeks.

Q. How long was it after they left San Francisco that you came here and went to Miner Lii's?

(Testimony of Frank Sampson.)

A. I guess about a month.

Q. They had been home about a month?

A. Three weeks to a month, something like that.

Q. Did you come down alone?

A. Yes, I did.

Q. Are you married? A. Yes, I am. [102]

Q. Was your wife ever here?

A. Yes, she was.

Q. When was she here?

A. She was here in November.

Q. You were still living in Miner Lii's then?

A. No, I wasn't.

Q. And where did your wife stop while she was here?

A. We stayed at the Beach Walk apartments.

Q. Were you here then? A. Yes, I was.

Q. How long was she here?

A. About three weeks.

Q. And did you and she live together in the Beach Walk apartments? A. Yes, we did.

Q. How long had you known Sarah Lee Wright?

A. Since August of 1950.

Q. So you had only know her two or three months when you met Miner Lii at your dad's bar, is that right? A. Right.

Q. Did you know what her business was?

A. No, not at that time.

Q. What's that? A. Not at the time.

Q. All the time she was in San Francisco you didn't [103] know what her business was?

(Testimony of Frank Sampson.)

A. Well, I just seen her. She had worked at a night club there in San Francisco.

Q. This Mary who accompanied you to the airport, how long had you known her?

A. I knew her a long time ago when we were kids.

Q. When you were on a ship—when you were kids?

A. When we were children. I knew her brother.

Q. Now, the first time you knew that Sarah was coming to Honolulu was when you heard her say she was coming for a vacation on this day?

A. No, the night before they left San Francisco.

Q. And that was the night before she left, is that right? A. Yes.

Q. Now, was that the same day you met Miner the first time in October? A. No, it wasn't.

Q. How many times had you been together with Miner Lii or with Miner Lii and his wife before the occasion on which Sarah was also present and she had said she was coming to Honolulu for a vacation? A. Well, twice, two times.

Q. And the first time who all were in the party?

A. Walked in my dad's bar was Mr. and Mrs. Lii and [104] Sarah,

Q. Mr. and Mrs. Lii and Sarah?

A. Right.

Q. They were there? And did you talk to them?

A. Yes, I just said "hello" and sat down with them.

(Testimony of Frank Sampson.)

Q. And that was all? A. That's all.

Q. And then how long after that was it that Sarah told you she was coming to Honolulu for a vacation?

A. It was the night before they left, about two days I mean.

Q. How many days? A. Two days.

Q. Two days afterwards? Then you offered to bring them to the airport? A. That's right.

Q. Where did you pick Sarah up?

A. At 100 Webster Street, San Francisco.

Q. What is that, do you know?

A. I guess you call it a flat.

Q. Is that where she lived?

A. That's where she lived.

Q. Is that where her mother lives?

A. I don't know if she has a mother there.

Q. What's that? [105]

A. Where her mother lives?

Q. Yes.

A. I don't know where her mother lives.

Q. You don't know if she has a mother?

A. That's right.

Q. Was she alone when you picked her up?

A. No, Mary was there.

Q. Do you know where Mary was living at that time? A. No, I don't.

Q. Who was with you when you picked up Sarah and Mary at 100 Webster Street?

A. No one, just myself.

Q. Then where did you pick up Miner Lii and

(Testimony of Frank Sampson.)

his wife? A. At their hotel on Taylor Street.

Q. Taylor Street? A. Taylor Street.

Q. And after picking up Mr. and Mrs. Lii, did you go straight to the airport?

A. Yes, we did.

Q. You didn't pick up anybody else?

A. No one else.

Q. And were you at the airport very long before it was time for them to get on the plane?

A. About three, four minutes, I believe.

Q. Three or four minutes? [106] A. Yes.

Q. You hardly had got them there when you heard them call the flight?

A. Yes, as soon as their bags were picked up.

Q. Just about made the plane, is that right?

A. Yes. Well, they call it 15 minutes earlier before the plane takes off.

Q. And when the flight was called, did Mr. and Mrs. Lii, Mary and Sarah then start for the plane?

A. Yes, they did.

Q. And you turned around and went out?

A. That's right.

Q. You were there only three or four minutes?

A. That's right.

Q. The first time you saw Miner and Alice Lii and Sarah together you didn't stop to talk, merely said "Hello" and kept going?

A. I was right at the bar, sitting at the bar.

Q. They were sitting?

A. They were sitting at the booth. I was sitting at the bar.

(Testimony of Frank Sampson.)

Q. And it was from the bar that you saw them?

A. That's right.

Q. And that's all the conversation?

A. Right there, yes. [107]

Q. Was anybody else with them? Was Mary there at that time? A. No, she wasn't.

Q. Just three of them? A. That's right.

Q. Did you see anything more of them that night? A. No, I didn't.

Q. Whose car did you use to take them to the airport? A. My car.

Q. You have a brother who is known as Junior?

A. That's right.

Q. Does he own a car, too?

A. I don't know now at the present.

Q. Well, at that time? A. No.

Q. Did you ever lend Miner Lii your car?

A. No.

Q. In San Francisco? You and Sarah were pretty good friends, weren't you, after you met her?

A. Well, pretty good friends.

Q. And you followed her to Honolulu, didn't you? A. No, I didn't.

Q. Did you have a ship in October before you met Miner Lii? A. No, I didn't. [108]

Q. Before you knew Sarah was coming to Honolulu? A. No, I didn't.

Q. When you learned that Sarah was coming to Honolulu, then you shipped over?

A. No, I——

Q. How long after?

(Testimony of Frank Sampson.)

A. Four months, I believe. In March.

Q. I mean, how long after you knew that Sarah was coming to Honolulu was it that you shipped?

A. Well, February. I was on a ship in February.

Q. In February following?

A. That's right. You mean when I came over to Honolulu?

Q. Yes.

A. Came over in October, I believe, or the first part of November.

Q. Well, how did you come over?

A. I came over by plane.

Q. Oh, you didn't come as a seaman?

A. No, I didn't.

Q. Did you buy your own ticket?

A. Yes, I did.

Q. With your own money? A. Yes, I did.

Q. It isn't true that Sarah sent you money to come over? [109]

A. She sent me some money but not to come over.

Q. What?

A. She sent me some money but not to come over.

Q. How much money did Sarah send you?

Mr. Richardson: I object to that, if your Honor please. He made the same objection—trying to show how much money this girl earned.

Mr. Soares: It isn't to prove how much she earned or anything. It is to prove the relationship between these two people.

The Court: All right. Answer it.

(Testimony of Frank Sampson.)

Q. (By Mr. Soares): How much did Sarah send you? A. I guess \$200, I believe.

Q. Did she send you any other money at any other time? A. No, she didn't.

Q. Why did she send you \$200, do you know?

A. No, I don't.

Q. Did she send any letter with it?

A. No.

Q. Just sent you \$200 without saying a word?

A. That's right.

Q. And how long before you came to Honolulu did you receive that \$200?

A. Oh, three days, I believe. [110]

Q. Had you communicated with Sarah in any way from the time she left for Honolulu until you received that \$200? A. Yes.

Q. By what means did you communicate?

A. Oh, by letter.

Q. Did you ever send her a wire?

A. No, I didn't.

Q. How did this \$200 come to you?

A. By wire.

Q. Now, isn't it true, Babe, that what happened was that you wired to Sarah for some money so that you could come to Honolulu?

A. No, that's wrong.

Q. Well, how many wires did you send to Sarah?

A. Didn't send any at all.

Q. It was the money that came to you by wire?

A. That's right.

Q. You wrote her also?

(Testimony of Frank Sampson.)

A. Yes. Not for money.

Q. You know you never asked for any money?

A. No, I didn't.

Q. Is that the only time you ever received money from Sarah? A. That's right.

Q. And you don't understand why she should be sending [111] you \$200?

A. No. I mean, we were pretty good friends. She sends—well, she's good-hearted.

Q. And she just sent this out of the bigness of her heart? A. Could be.

Q. Well, was it? A. Yes.

Q. You were surprised when you received it?

A. I was.

Q. So you bought a ticket to come down and see her?

A. Not to see her. I planned attending the University here.

Q. You planned to attend the University here?

A. I wanted to find out if they had any law courses.

Q. You came all the way from San Francisco to find out if the University of Hawaii had a law course?

A. Well, sure. And to have a vacation at the same time.

Q. It never occurred to you to look it up and see if they had a law course? A. No, it didn't.

Q. You found out that they don't have a law course, didn't you? A. That's right.

(Testimony of Frank Sampson.)

Q. When did you first make up your mind you were going [112] to study law?

A. Oh, I planned that about a year ago.

Q. But you waited until Sarah came to Honolulu before you decided you'd take her money and get a plane ticket so that you could go up in person to the University of Hawaii and study law?

A. No, I didn't. I attended school there in San Francisco just before they left.

Q. Is that your best answer to my question?

A. Well, you mean I accepted her money to come here? No, that's wrong.

Q. Did you bring your wife with you?

A. No, I didn't.

Q. Why not?

A. At that time I didn't have enough money.

Q. Besides the \$200 Sarah sent you by wire, how much money did you have? A. Oh, about \$60.

Q. So you, with total assets of \$260, you decided you would come to Honolulu to go to the University of Hawaii and find out if you could study law?

A. Or play ball.

Q. Or play ball? What do you mean by that?

A. Basketball.

Q. For the University? [113]

A. Well, if I could.

Q. And \$260 is all you had?

A. That's right.

Q. Part of that you spent for a plane ticket?

A. That's right.

(Testimony of Frank Sampson.)

Q. How much? A. \$184.

Q. How did you expect to live while you were in Honolulu studying law at the University of Hawaii?

A. I have friends here.

Q. You expected to live off your friends?

A. No, they were my dad's friends.

Q. I say, you expected to live off them?

A. No, I don't.

Q. Well, will you answer my question, then? How did you expect to live in Honolulu away from home while you were studying law at the University of Hawaii?

A. My dad would send me through school.

Q. Did you talk to him about that?

A. Yes, I did.

Q. And did he promise to send you?

A. Well, he said if I'd go to school, he would.

Q. Well, then, did you ask him for the plane fare to come to Honolulu?

A. No, I didn't. [114]

Q. Did you ask your dad for any money while you were in Honolulu? A. Yes, I did.

Q. How much did you get from him?

Mr. Richardson: If your Honor please, I object to this. This is not getting anywhere.

Mr. Soares: Does Counsel believe this story for any minute? Haven't we a right to develop that?

Mr. Richardson: Mr. Soares has been doing that all through this trial.

Mr. Soares: Counsel gets up and every time it

(Testimony of Frank Sampson.)

gets hot he begins to object, and he doesn't state the grounds for the objection or anything at all.

Mr. Richardson: It isn't necessary to state my——

Mr. Soares: And then, when it is apparent what we are leading to, then he suddenly objects.

The Court: Well, what are you leading to? Go to it.

Mr. Soares: Exactly. Will you read the question?

(The reporter read the last question.)

A. I didn't get anything.

Q. When did your wife arrive in Honolulu?

A. On November some time. I can't recall.

Q. Did you send for her? A. Yes.

Q. Did you send her the money for [115] coming? A. No, I didn't.

Q. Do you know how she got the money to get here? A. My mother.

Q. Did you know she was coming?

A. Yes, I did.

Q. Did you ever live at the Queen's Hotel?

A. Yes, I did.

Q. How many days?

A. Three days, four days.

Q. And with whom did you live at the Queen's Hotel for three or four days?

A. Miss Wright.

Q. You registered there as man and wife, didn't you? A. Yes.

(Testimony of Frank Sampson.)

Q. Was your wife in town then? A. No.

Q. How did you register, in what name did you register? A. Mr. and Mrs. Sampson.

Q. Mr. and Mrs. Sampson? A. Yes.

Q. Do you have you ship's paper with you?

A. No, not at the present.

Q. Do you have any identification with you?

A. It's over at the building.

Q. Do you have any identification of any kind with you?

A. No, not here. My wallet is in my luggage.

Q. Have you always gone by the name of Frank Sampson? A. Yes, I have.

Q. You use no other name?

A. Francisco.

Q. No other last name?

A. No other last name.

Q. Didn't you go by the name of Blanco?

A. No, I don't.

Q. Now, as I understand it, you were at your dad's bar and looked over in one of the booths and you saw Miner Lii, Alice Lii and Sarah Wright sitting there?

A. I didn't look. I walked in and I seen them.

Q. When you walked in you saw them and went through the bar?

A. No, I sat alone and went to the bar.

Q. And that's all you said to them that day?

A. That's right.

Q. Then you never saw them together again until two days afterwards? A. That's right.

(Testimony of Frank Sampson.)

Q. Now, where did you see them on that second day? A. At the bar.

Q. Were they in the booth again?

A. No, they were at the bar. [117]

Q. Were there just the three of them together at the bar in their party?

A. No, she wasn't at the bar. Mr. and Mrs. Lii was at the bar. She was in a booth?

Q. And where was Miner Lii?

A. At the bar.

Q. Mr. and Mrs. Lii were at the bar? Sarah Wright was in a booth by herself? A. Yes.

Q. Alone? A. Yes.

Q. And then did you see her together with Mr. and Mrs. Lii after that?

A. We sat down. I told them to come over to the booth. We sat down.

Q. Over in the booth? A. That's right.

Q. And then this conversation took place?

A. No conversation, like together—see, there was a singer, so we all went out to see the singer.

Q. You all went out to see a singer?

A. That's right.

Q. Was anything said about Sarah coming to Honolulu the next day at that time?

A. No, there wasn't. [118]

Q. When was it that you first learned that Sarah was coming to Honolulu for a vacation?

A. Well, that was the night before they left. She said she was——

Q. Well, that was the second time you met her?

A. Yes.

(Testimony of Frank Sampson.)

Q. And that's the time that you all went out to hear this singer? A. Yes.

Q. And all she said was, "Babe, I'm going to Honolulu for a vacation"? A. That's right.

Q. Were Mr. and Mrs. Lii in a position where they could hear it?

A. No. I believe after I dropped them, just before we dropped all together——

Q. So you didn't know anything about Sarah Wright coming to Honolulu until after you had dropped Mr. and Mrs. Lii off and dropped Sarah off?

A. Well, she was leery. She told me at the beginning she would like to go but she said she didn't know whether she was going or not.

Q. Wait a minute. I didn't get that.

(The reporter read the last answer.)

Q. Who do you mean by "she"? Sarah? [119]

A. Sarah.

Q. At the beginning, you mean in the early part of the evening? A. That's right.

Q. And when you dropped her off she told you she was going? A. That's right.

Q. And you agreed to pick her up?

A. That's right.

Q. Where did you drop her off?

A. 100 Webster Street.

Q. That was not her home?

A. That was her home.

Q. She was living there? A. Yes, she was.

(Testimony of Frank Sampson.)

Q. You said something earlier in the evening Sarah Wright was leery about whether she was going. Just what do mean by leery?

A. Well, she didn't know whether she was going or not.

Q. Well, what did she say? What language did she use?

A. Well, she said, "I don't know whether I'm going or not."

Q. Did she say, "I have a chance to go to Honolulu; I don't know whether I will go or not?"

A. That's right. [120]

Q. And then, when you left her, she said, "I am going for a vacation"? You didn't inquire into it any further?

A. No, I didn't.

Q. Have you ever been convicted of any offenses against the laws?

A. No, I haven't.

Q. At the end of three days at the Queen's Hotel, where did you move to?

A. Near Nano Way, 148, I believe it is, or 152-A Nano Way.

Q. 184, wasn't it?

A. Yes, 184—148.

Q. Did both you and Sarah move out there?

A. Yes.

Q. And did you again register at that apartment as Mr. and Mrs. Frank Sampson?

A. No, I didn't register. I didn't know about it. She registered there.

Q. And do you know under what name she registered?

A. Under Sarah Sampson.

(Testimony of Frank Sampson.)

Q. Sarah Sampson? And how long did you and Sarah occupy the apartment at 148 Nano Way?

A. I stayed there a week.

Q. Did you live there together as man and wife?

A. Yes, I was there. [121]

Q. What's that? A. I was there.

Q. As man and wife?

A. Well, no, not as man and wife.

Q. Did you occupy the same bed?

A. No.

Q. How many days did you spend there?

A. A week.

Q. You say you didn't have sexual intercourse with Sarah at that time?

A. I wouldn't say every night.

Q. Not every night? But during the period?

A. Twice.

Q. And at the Queen's Hotel? A. None.

Q. Three nights and you didn't?

A. That's right.

Q. You didn't have intercourse with her?

A. That's right.

Q. And then how did you come to leave her at Nano Way?

A. Well, my wife was coming up so I intended to go back.

Q. Go back where? A. San Francisco.

Q. In other words, if your wife hadn't come you were [122] to continue to live there with Sarah?

A. No, I was going back.

Q. You made up your mind to go back?

(Testimony of Frank Sampson.)

A. Yes, I did.

Q. And did you go back?

A. I played ball about a week before I went back.

Q. You mean basketball? A. That's right.

Q. Professional ball? A. No.

Q. Fixed games? A. No fixed games.

Mr. Richardson: I object to that.

Q. (By Mr. Soares): Whether you made any money or not?

A. No. It was for the Oldsmobile Rockets.

Q. Well, did you earn any money during the time you were in Honolulu?

A. Not working, no.

Q. Well, did you earn it in any way?

A. Yes, fellows off the ship that I know would give me ten or fifteen.

Q. How much money would you say you got in that amount? A. Oh, I guess about \$80.

Q. And you were in Honolulu how long altogether on that [123] trip?

A. I guess not quite two months.

Q. What?

A. Not quite two months or about two months.

Q. How did you live?

A. Well, Sarah had money.

Q. You lived off Sarah's money?

A. For a while.

Q. Did you live pretty well?

Mr. Richardson: If your Honor please, I am

(Testimony of Frank Sampson.)

objecting to all this line of testimony. It is immaterial to what the trial is about.

Mr. Soares: It is very material to show what the attitude is. They are attempting to send these people to jail, and here is a witness that says that she wasn't a prostitute after she left home and they hide the fact from the jury that she was living with him as man and wife and pretending that some girl was sharing the apartment with her. Can't we go into all of this and let the jury get a true picture of this situation of the kind of testimony which they expect to send this little woman and her husband to jail on?

The Court: Well, the witness isn't on trial for anything that I know of.

Mr. Richardson: This witness' character is not in issue.

Mr. Soares: It certainly is in issue as far as his [124] credibility is concerned.

Mr. Richardson: He is not being tried.

Mr. Soares: Does the Court sustain the objection?

The Court: Yes.

Mr. Soares: Save an exception.

Q. (By Mr. Soares): Were you in Honolulu when Sarah moved out to Isenberg road?

A. No, I wasn't.

Q. Did you and your wife leave Honolulu together? A. No.

Q. Who went first? A. My wife did.

Q. How long afterwards did you follow?

(Testimony of Frank Sampson.)

A. Five days.

Q. You and your wife are living together now?

A. Yes, we are.

Mr. Soares: No further questions.

(Witness excused.)

The Court: Have you got another witness yet?

Mr. Richardson: No, sir, I don't. Could we approach the bench, Mr. Soares, please?

(Court and counsel confer.)

The Court: The Court adjourns until tomorrow morning at 9:30. And in the meantime the jurymen will not discuss [125] the case, the evidence, insofar as they have heard the evidence, or receive the opinion of any other person, not even fellow jurors, and particularly not the opinion of anyone else. Keep your minds open so that you may do your full honest duty when the case is all submitted to you. There is yet to come perhaps further evidence, testimony. I don't know anything about that, nor do you, as to what is yet to come. But there will be undoubtedly argument by counsel and instructions of the Court relating to the law pertinent to the case. But just keep your minds open and your mouths closed so far as this case is concerned.

(The Court adjourned at 4:15 p.m.) [126]

May 22, 1951

(The Court convened at 9:30 a.m.)

The Clerk: Criminal No. 10,419, United States of America, Plaintiff, versus Miner Lii and Alice Lii, Defendants; case called for further trial.

The Court: The jury is present and in the jury box. You may proceed.

Mr. Richardson: If your Honor please, at this time the Government rests its case in chief.

Mr. Soares: I then move that the jury be directed to find a verdict of not guilty against the defendant, Miner Lii, there being no evidence to establish the allegations of the indictment as to him.

The Court: The motion is overruled.

Mr. Soares: I then save an exception. Is the girl Sarah here?

Mr. Richardson: She is.

Mr. Soares: For purposes of identification.

Mr. Richardson: She is in my office.

Mr. Soares: Can you call her, because of the witness I am going to call, so that he can see her? Will you call Harold Lewis to the stand, please?

The Bailiff: He is not there.

Mr. Soares: He must be there. I was talking to him. [127] May I step to the door, if the Court please?

The Court: Yes.

(Mr. Soares leaves courtroom for a few moments.)

Mr. Soares: If the Court please, the witness

Harold Lewis was out in the corridor this morning and I spoke to him, and he must have apparently gone. I'd like a few minutes recess to check.

The Court: Well, is he under subpoena?

Mr. Soares: No, he is not under subpoena, if the Court please. I talked to him only late yesterday afternoon.

The Court: How much recess do you want?

Mr. Soares: Just so that I can go to a telephone and see if I can find out where he is. Say about ten minutes.

The Court: Can't you do that in less time?

The Bailiff: He is not here.

Mr. Soares: I'd like to make one telephone call, if the Court please.

The Court: All right. We will take a brief recess.

(A recess was taken at 9:38 a.m.)

Mr. Soares: Shall I proceed, your Honor?

The Court: Yes.

Mr. Soares: Harold Lewis, will you take the witness stand, please?

HAROLD JOHN LEWIS

a witness on behalf of [128] the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Soares:

Q. What is your name?

A. Harold John Lewis, L-e-w-i-s.

Q. Where do you live?

(Testimony of Harold John Lewis.)

A. I live at 313 Royal Hawaiian Avenue.

Mr. Richardson: What is that street?

The Witness: Royal Hawaiian Avenue, 313.

Q. (By Mr. Soares): Mr. Lewis, I had an interview with you this morning before coming to Court? A. That's right.

Q. And as a result of that interview you agreed to come to Court to be a witness?

A. That's right.

Q. And you were here before Court convened? You were here before the Court opened?

A. That's right.

Q. And where did you go?

A. To the tax office.

Q. Pardon?

A. I was here in front of the tax office.

Q. Why did you leave the Court?

A. I filed some returns there a year ago and to find [129] out if he finished it for me.

Q. Were you expecting to come back?

A. Yes.

Mr. Soares: Now, I wonder if we could have Sarah Lee Wright stand so this witness may be able to identify her?

Mr. Richardson (to Sarah Lee Wright): Will you stand?

(Sarah Lee Wright complies.)

Mr. Soares: That's all we shall require of her, Mr. Richardson.

Mr. Richardson: If your Honor please, I prob-

(Testimony of Harold John Lewis.)

ably will use her in rebuttal, and I suppose under those circumstances she should leave the courtroom.

The Court: Yes.

(Sarah Lee Wright leaves courtroom.)

Q. (By Mr. Soares): Did you notice the lady who stood up when I asked to have Sarah Lee Wright stand up? A. Yes.

Q. Have you ever seen her before?

A. Yes.

Q. Where did you first see her as far as you can remember? A. On the Island of Kauai.

Q. Did you see her—perhaps I had better identify the witness a little further. What is your business, Mr. Lewis? [130]

A. I am a private pilot. My business is flying and teaching flying.

Q. Did you ever see Sarah Lee Wright on the Island of Kauai between, any time between the month of September and Christmas time of last year?

A. Like I said this morning, I seen her.

Q. Well, you can't tell what you told me.

A. Any time from after September 15th. I won't commit myself on a day and about the month, but I seen her there any time after September 15th.

Q. Some time after September 15th? And Christmas?

A. It might be a little after Christmas?

Q. But Christmas month?

A. Yes. It wasn't in the month of Christmas.

(Testimony of Harold John Lewis.)

Q. It was not in that month, but it was some time after September and before Christmas month?

A. That's right.

Mr. Soares: You may cross-examine.

Cross-Examination

By Mr. Richardson:

Q. When was the first time you saw this Miss Wright, Mr. Lewis?

A. On the Island of Kauai.

Q. That's the first time you saw her?

A. First time in my whole life. [131]

Q. How many times did you see her there?

A. Once.

Q. Just one time on Kauai?

A. That's true.

Q. When is the next time you saw her?

A. In Honolulu.

Q. When was that?

A. It was a little while back.

Q. Well, how far back?

A. Well, a couple of months, I'd say.

Q. Now, have you seen her since then up until today? A. Once again.

Q. How long ago was that?

A. About three days ago.

Q. Where did you see her then?

A. At a party.

Q. Where was the party?

A. Up at—I just don't know the street, but it was out in Kalihi district somewhere.

(Testimony of Harold John Lewis.)

Q. And you have seen her three times, is that right?
A. That's true.

Q. And you distinctly remember that you saw her in Kauai some time around September 15th?

A. That's true.

Q. Now, Mr. Lewis, you saw her out in the hall here [132] this morning, didn't you?

A. That's true.

Q. Weren't you standing by the door as she came down the hall to come into the courtroom?

A. I was not standing by the door.

Q. Where were you standing?

A. I was 'way down the end of the hall.

Q. You saw her as she came by?

A. She walked towards where I was.

Q. And she stopped and said something to you?

A. She did not talk to me.

Q. Didn't she make a remark to you there?

A. She did not.

Q. And didn't you immediately leave the place?

A. No such thing.

Q. That didn't happen?

A. That didn't happen.

Q. Where is this tax office you went to?

A. Right straight down in the field office. I went down to see John Kramer.

Q. What floor is it on?

A. It's on the first floor in the subdivision out here.

Q. And you knew the Court had started here, didn't you?

(Testimony of Harold John Lewis.)

A. Well, I was under the impression that I would come on in about an hour some time. [133]

Q. Who told you that?

A. Nobody told me. I just took it on my own.

Q. Didn't Mr. Soares tell you he was going to use you as the first witness?

A. He might have, but I don't remember.

Q. And you say the reason you left here this morning was not because you saw this girl out here in the hall and knew that she knew you? That didn't happen? A. No.

Q. What do you do for a living?

A. Well, by profession I am a pilot.

Q. Who do you work for?

A. I work for my own—I owned Lewis Flying School out there for several years in Haleiwa.

Q. Do you own it still?

A. No, the Government closed it down. I'm a band leader. I've been working for the service clubs. I've been doing that ever since I came back from Kauai.

Q. Have you ever been known as Harold Earl Lewis?

A. Harold Earl Lewis? Never in my life. My name is Harold Lewis. I have no police record whatsoever.

Q. You never used the name of Harold Earl Lewis? A. Never in my life.

Q. And you positively identified this girl as the girl you saw in Kauai? [134]

A. That's true. And I even called a few people's

(Testimony of Harold John Lewis.)

attention to it and they admitted that she was there.

Mr. Richardson: I object to that and move that that be stricken as hearsay.

Mr. Soares: You asked for it.

Mr. Richardson: I didn't ask for that.

The Court: That may be stricken.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): What were you doing in Kauai? A. I was flying.

Q. Were you flying from Honolulu to Kauai?

A. No, I was working on Kauai; flying from Kauai to Niihau. I was at the two airports every day. It just was a coincidence that I seen her there because very few white people on that island.

Q. On Kauai?

A. That's true. Outside of the plantation wives and a few girls in the bars, and when you see a few white girls come there you more or less take a couple of looks.

Q. And you saw her last September?

A. I said any time after September 15th.

Q. All right. Any time after September 15th you saw her there? And you saw her again about two months later?

A. Not two months later. I saw her when I got back [135] home here a couple of months ago.

Q. A couple of months ago? A. Yes.

Q. And you remembered her when you saw her before as the same girl that you had seen in Kauai?

A. Well, I asked a certain fellow——

Q. You can't tell what somebody told you.

(Testimony of Harold John Lewis.)

A. You are asking me where I seen her. I was going to tell you where I seen her.

Q. I asked you if you remembered her the second time from the first time?

A. That's right.

Mr. Richardson: That's all.

Redirect Examination

By Mr. Soares:

Q. Now, Mr. Lewis, when you saw her the first time in Honolulu after having seen her in Kauai, under what circumstances did you see her? Where was she? Who was she with?

Mr. Richardson: I object to that, if your Honor please. It is a matter that he should have gone into in evidence in chief.

Mr. Soares: Oh, no. This is made necessary by the doubt that counsel has attempted to cast on the man's testimony. He went into all these details. I didn't even bring out the fact. [136]

Mr. Richardson: On cross-examination.

Mr. Soares: I'd like to complete my argument to the Court without interruption. I never asked him about seeing her in Honolulu at all. Counsel developed that fact. It is new matter brought out on cross-examination about which we have a right to inquire.

The Court: What is your inquiry?

Mr. Soares: Under what circumstances he saw her in Honolulu after having first seen her on Kauai towards the latter part of 1950.

(Testimony of Harold John Lewis.)

Mr. Richardson: Then I object to that as being immaterial, if I understand the question about the circumstances he saw her under in Honolulu.

Mr. Soares: That's right.

Mr. Richardson: Of course, this witness is evidently being introduced for the purpose of proving the girl was in Kauai. Now, the circumstances under which he saw her in Honolulu are immaterial, if your Honor please.

Mr. Soares: Well, I submit it is not. It is a new matter that was brought out on cross-examination. We certainly have a right to have him testify to those circumstances, after counsel has attempted to cast doubt on his testimony.

The Court: Oh, I think it isn't necessary to go any further with that. He testified he saw her on Kauai. He didn't tell under what circumstances he saw her there. And [137] I don't know why the circumstances of having seen her here, as he says, two times after that makes any difference. I don't see that it is material.

Mr. Soares: Save an exception to the ruling of the Court.

Q. (By Mr. Soares): When she was in Honolulu after you had seen her on Kauai, was she with anyone? A. Yes, she was.

Q. And with whom was she?

A. With a boy. I thought it was a boy friend.

Q. Well, do you know the name——

Mr. Richardson: I object to that, when he thinks.

(Testimony of Harold John Lewis.)

Mr. Soares: We have no objection to that.

Q. (By Mr. Soares): What is the name of the boy with whom you saw her?

A. Well, the name was Willie Cluny.

Q. And without saying what conversation was had, did you discuss her with Willie Cluny at that time?

Mr. Richardson: I object to that, if your Honor please. It can have no possible bearing on this case.

Mr. Soares: Redirect examination, if the Court please. I'd like to be permitted to approach the bench with counsel and tell the Court what I expect to develop in that connection.

The Court: All right.

(Court and counsel confer.) [138]

The Court: The jury may be excused for a few minutes.

(Jury leaves courtroom at 10:00 a.m.)

Mr. Soares: Does counsel want the witness excused while I make an offer of proof?

Mr. Richardson: Yes.

The Court: This witness?

Mr. Soares: Yes.

Mr. Richardson: Yes, I'd like to have him excused.

(Witness leaves courtroom.)

Mr. Soares: We offer to prove, if the Court please, that on this occasion when he returned from Kauai and saw Sarah Lee Wright in Honolulu, a

fact which developed for the first time under cross-examination of this witness, Cluny asked him if he was sure that this was the same girl, that is to say, the same girl that he had seen with Cluny, and he insisted that it was. Whereupon Cluny produced photographs and he again identified the photographs as being photographs of this girl, that is to say, photographs of the girl whom he had first seen on Kauai and again saw in Honolulu in company with Cluny. Now, we expect to show that, of course, without the hearsay testimony, but by simply showing that as a result of this conversation between Cluny and Lewis that Cluny produced photographs and Lewis identified them as photographs of this girl.

Mr. Richardson: If your Honor please, of course our [139] objections are, first, that that couldn't be shown without some hearsay. You have got to show a conversation between this witness and Cluny, which they can't do; secondly, because all this witness is being offered for is for the purpose of showing the girl was on Kauai. All these things that occurred after they returned to Honolulu are immaterial and irrelevant.

The Court: The offer of proof is denied.

Mr. Soares: We save an exception.

The Court: Bring the jury in.

Mr. Soares: It won't be necessary to call the witness unless counsel——

Mr. Richardson: No, I don't want him.

Mr. Soares: In view of the Court's ruling.

(Jury returns to courtroom.)

(Witness excused.)

The Court: The Court is now assembled with the jury present. The jury is in the box. The offer of proof made is denied.

Mr. Soares: Save an exception to the ruling of the Court.

The Court: Proceed.

Mr. Soares: The exception is allowed, if the Court please?

The Court: Oh, it is noted.

Mr. Soares: Take the stand, Mrs. Lii. [140]

ALICE LII

a witness in her own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Soares:

Q. What is your name? A. Mrs. Alice Lii.

Q. Where do you live, Mrs. Lii?

A. 1324 Gulick Avenue.

Q. How long have you lived there?

A. About five years.

Q. Are you married? A. I am.

Q. What is your husband's name?

A. Miner Lii.

Q. This is Miner Lii who sits at the table?

A. That's right.

Q. And you and he are the defendants in this case? A. We are.

(Testimony of Alice Lii.)

Q. How many children have you?

A. I have three.

Q. How old are they?

A. My youngest one is my boy, who is one year old. I have another boy who will be three pretty soon, three years. And my oldest is my girl, who will be nine years pretty soon.

Q. In the latter part of September or the first part [141] of October last year, were you in San Francisco? A. I was.

Q. And how did you get to San Francisco?

A. On a plane.

Q. On what airline did you travel?

A. It was the Skymaster.

Q. Is that one of the unscheduled flights?

A. That's right.

Q. Did your husband accompany you on that trip? A. He did.

Q. For what purpose did you and your husband go to San Francisco at that time?

A. Well, I had never been up to the mainland, and I always wanted to go up there, so we went there for a vacation.

Q. Do you know whether or not your husband had any relatives in San Francisco?

A. Yes, he got a brother out in San Francisco.

Q. What is his name?

A. It is Joseph Lii, but he is known as Dodo, D-o-d-o.

Q. Do you know what his business is?

A. He is a merchant seaman.

(Testimony of Alice Lii.)

Q. Do you know whether or not your husband ever was a merchant seaman?

A. Yes, he was.

Q. Did you have any plans with reference to this [142] vacation as, for instance, to how long you were going to stay and by what means you were going to return?

A. Well, my plans was to stay there about three weeks to a month.

Q. And did your plans include the manner of transportation you were going to use to come back?

A. Well, what do you mean by that?

Q. Well, had you made, had you planned to return by plane or by boat?

A. Oh, I planned to return by boat.

Q. When you purchased your tickets to leave here, did you get return trip tickets?

A. I did not.

Q. And why didn't you get return trip tickets?

A. Because I had in mind that I wanted to come back on a boat.

Q. When did you return to Honolulu?

A. It was on October 9th.

Q. And by what means did you return to Honolulu? A. Well——

Q. Just tell us what means, boat, plane or what?

A. By plane.

Q. And what plane?

A. It was the Pan-American.

Q. You have testified that your original plans

(Testimony of Alice Lii.)

were [143] to stay, I believe you said, three weeks or a month? A. That's right.

Q. And to return by boat? A. Yes.

Q. Now, why did you change your plans?

A. What do you mean by changing?

Q. Well, why didn't you come by boat and why did you come back so soon?

A. Well, the reason why I came back sooner than I expected was because while I was there I made a telephone call.

Q. Telephone call to where?

A. To the woman who was taking care of my three children.

Q. And did you learn anything by that telephone call? A. Yes, I did.

Q. What did you learn?

A. She told me that my mother was admitted to——

Mr. Richardson: I object to that as hearsay.

Mr. Soares: We are not trying to prove the facts of what she said. We are trying to prove the knowledge that came to this witness' attention upon which she acted.

The Court: Well, you have a direct way of proving it by her testimony——

Mr. Soares: That is why I am asking this question. [144]

The Court: ——that she acted a certain way in pursuance of the conversation.

Mr. Soares: All right. We will save an exception to the ruling of the Court.

(Testimony of Alice Lii.)

Q. (By Mr. Soares): As a result of this telephone call, did you change your plans?

A. I did.

Q. And was it because of what you had been told over the telephone that you changed your plans?

A. That's right.

Q. Now, why did you change your plans?

A. Well, this woman whom I talked to over the telephone——

Q. Well, the Judge says you can't repeat what she said. But what did you learn which caused you to change your plans?

Mr. Richardson: That is the same thing, if your Honor please. Ask her what she did. He can ask her that. And not what she learned because that is the same as asking her what somebody told her. She can state what she did.

Mr. Soares: I submit, if the Court please, that we have a right to present to the jury everything that occurred that caused her to change her plans. It doesn't make any difference what it was, whether it was something she knew of her own knowledge or whether it was something that she was told. The fact is that it resulted in her changing her [145] plans.

The Court: Well——

Mr. Soares: May I illustrate it this way, if the Court please: supposing she had been told on the telephone that her house had burnt down? Now, could we not bring evidence of that to show why she changed her plans? Not to show that her house ac-

(Testimony of Alice Lii.)

tually had burnt down but that she had been told that it had been burnt down. So she rushed back to attend to matters which naturally need to be attended to where there is a fire. And I say again, so there won't be any confusion, that that is not the thing that we are asking for but I speak of it merely to illustrate the point.

The Court: Well, you laid the rule down pretty tightly in this case itself. She can tell the fact that she did return here, which she already has testified to, and she can tell why, what prompted her.

Q. (By Mr. Soares): Why did you return?

A. I returned because my mother was in the hospital.

Q. When did you first learn that your mother was in the hospital? If you can't remember the day or the month, tell us the day of the week, if you can remember.

A. It was on a Thursday.

Q. And on what day of the week did you return from San Francisco?

A. I returned on Monday. [146]

Q. Was it the following Monday?

A. That's right.

Q. You saw Mary Lee Wright on the witness stand and heard her testify, did you?

A. You mean Sarah Lee Wright.

Mr. Richardson: You said Mary Lee; it is Sarah Lee.

Mr. Soares: I beg your pardon. Sarah Lee Wright.

The Witness: Yes.

(Testimony of Alice Lii.)

Q. (By Mr. Soares): When did you first meet Sarah Lee Wright?

A. The first time I met her was my second day in San Francisco.

Q. Your second what?

A. My second day in San Francisco.

Q. And where did you meet her?

A. It was in a bar.

Q. Do you know the name of that bar?

A. It is called "Blanco's." I remember the name "Blanco's" was on it.

Q. And can you tell the jury whether that is the same bar that Babe was referring to when he spoke of his dad's bar?

A. That is the one.

Q. Who, if anyone, introduced you to Sarah Lee Wright?

A. It was Babe who introduced us to her. [147]

Q. Was that in the daytime or nighttime?

A. It was in the night.

Q. After you were introduced to Sarah Lee Wright, what did you do and what did she do?

A. Well, we started to talk.

Q. Who were present when you were introduced to Sarah Lee Wright?

A. I don't remember who was there.

Q. Well, who was with you, if anybody?

A. When I was introduced to her?

Q. Yes.

A. Oh, Miner was with me.

Q. Had you and Miner gone to Blanco's bar together that night?

A. We did.

(Testimony of Alice Lii.)

Q. By the way, where did you stop when you arrived in San Francisco?

A. When I arrived in Oakland?

Q. Well, I meant at what hotel did you stop?

A. At the Grand Hotel.

Q. On what street, do you remember?

A. It's on Taylor.

Q. Taylor?

A. Yes, it's on Taylor Street.

Q. You say you arrived in Oakland? You mean the plane? [148]

A. The plane.

Q. Landed in Oakland? A. That's right.

Q. And did you leave Oakland immediately to go to San Francisco? A. Yes.

Q. And by what means did you go from Oakland to San Francisco?

A. We went on a bus, or whatever they call it, —a taxi where they have something like a limousine like——

Q. What time did you finally arrive at San Francisco and register at the hotel?

A. Well, it was some time in the morning but I don't remember the time.

Q. Do you know whether or not your husband was acquainted with the elder Blanco, the proprietor of Blanco's bar?

A. Yes, my husband and him were very good friends.

Q. Did you yourself know any of the Blanco family before? A. No, I did not.

(Testimony of Alice Lii.)

Q. Before you went to San Francisco?

A. No, I didn't know anyone.

Q. I believe you said your husband took you to Blanco's bar the first night that you landed in San Francisco, is that correct? [149]

A. That's right.

Q. And you met Babe there? A. Yes.

Q. And Babe introduced Sarah Lee Wright—

Mr. Richardson: If your Honor please, that is leading. There have been three or four questions. I don't mean to be objecting to everything but—

The Court: Yes, you have led her; it is different from her first testimony.

Mr. Soares: Would your Honor point out in what respect?

The Court: In this respect, that now you are having her say that she met Sarah Lee Wright the first night whereas she testified earlier that it was the second night.

Mr. Soares: I'm sorry.

Q. (By Mr. Soares): Can we get that straight, then, please, Mrs. Lii? Was it the first night you were in San Francisco or the second night?

A. The second night in San Francisco.

Q. Whom, if anybody, did you meet the first night you were in San Francisco?

A. Well, the first night, the first night we saw Miner's brother. That was Dodo.

Q. And did he accompany you—withdraw that. Where did you meet Miner's brother Dodo? [150]

(Testimony of Alice Lii.)

A. Well, he came up to our hotel.

Q. Do you know how he knew that you were in San Francisco?

A. Yes, my husband went to look for him at his hotel. He wasn't in. So he left word with the clerk at the desk that if he should come in to get in touch with us at our hotel.

Q. And did Dodo get in touch with you that first night? A. He did.

Q. Can you give the Court and jury any idea about what time it was that he got in touch with you at your hotel?

A. Oh, it was in the evening.

Q. Early evening or late evening?

A. Oh, I'd say about—it was getting to be kind of dark. I don't remember the exact time.

Q. Now, after Dodo came to your hotel and you met him, did you leave the hotel?

A. After Dodo came to our hotel?

Q. Yes.

A. Yes, the three of us left the hotel.

Q. And where did you go, if you can remember?

A. I am pretty sure that we went to a chop suey house. We had something to eat.

Q. Did you go to Blanco's bar that night?

A. Yes, we did.

Q. Did you meet anyone at Blanco's bar that night? [151] A. Yes, we saw Junior.

Q. And by Junior do you mean Babe's brother?

A. Yes.

Q. Did you meet anybody else that night?

(Testimony of Alice Lii.)

A. Well, I met the father, that is, Junior's father.

Q. Anybody else?

A. Well, I guess there's other people.

Q. Well, I mean that you were introduced to. Do you recall any others? Do you recall any others?

A. Maybe I was but I can't remember.

Q. How long did you remain in Blanco's bar the first night?

A. The first night? We stayed there for, oh, it wasn't too long.

Q. And then from there where did you go?

A. Well, since we weren't there Junior suggested that he take us around.

Q. And did he take you around?

A. He did.

Q. And who all were in the party?

A. Well, Junior was with another girl, and there was another couple and my husband and myself.

Q. Now, after taking you around, where did you finally stop?

A. You mean where—— [152]

Q. Where did the party break up? Let's put it that way.

A. I think it was down at Blanco's.

Q. Do you remember whether you went back to the hotel after Junior brought you back to Blanco's?

A. Yes.

Q. On the next night, that is, the second night you were in San Francisco, did you again go to

(Testimony of Alice Lii.)

Blanco's hotel, Blanco's bar? A. I did.

Q. And is that the time you say you met and were introduced to Sarah Lee Wright?

A. That's right.

Q. Will you tell the jury as much of the conversation that you can remember that took place between you and Sarah Lee Wright and your husband and any others who may have been together with you that second night at Blanco's bar?

Mr. Richardson: I object to conversations with any others. It is all right with these defendants and the witness, but we don't want just a general conversation thrown in here.

Mr. Soares: To prove what took place.

Mr. Richardson: It may prove what somebody said we never heard of.

The Court: Well, let's hear it.

Mr. Soares (to the witness): Will you go ahead and tell us? [153]

A. Well, the first time I met Sarah, well, we started to talk. She asked me, since I was from Honolulu—she heard so much about Honolulu that—she's never been down in Honolulu and that she always wanted to visit Honolulu. So she asked me what was the place like. I told her what Honolulu was like. Well, I guess that's about the only thing she asked me was about Honolulu.

Q. How long were you in Sarah Lee Wright's company that second night, that is, the first night you met her?

(Testimony of Alice Lii.)

A. Oh, it was about, I'd say less than half an hour.

Q. Do you remember what time, approximately what time you arrived at Blanco's bar on the second night that you were in San Francisco?

A. I don't remember the exact time but I know it was after seven o'clock.

Q. And how long did you remain at Blanco's bar?

A. You mean the second night I was there?

Q. Yes.

A. Oh, we didn't stay there too long.

Q. And from Blanco's bar where did you go?

A. Oh, we went to the night spots, like that.

Q. And who, if anyone, accompanied you to the night spots? I will withdraw that. Did anyone take you to the night spots? [154]

A. Yes.

Q. Who? A. It was Junior.

Q. This is the second night again?

A. The second night again.

Q. And who all went with you and Junior to the night spots?

A. The second night was Junior and his girl friend.

Q. The same girl that had been with him the night before? A. Yes, that's the same girl.

Q. And who else?

A. And my husband and I.

Q. Just the four of you?

A. That's right.

Q. I don't know whether you testified what day

(Testimony of Alice Lii.)

of the week was it that you arrived in San Francisco. Do you recall?

A. It was on a Monday morning.

Q. Do you know a girl by the name of Mary Chang? A. I do.

Q. Where did you first meet her?

A. I met her in Blanco's bar.

Q. And when did you first meet her?

A. I think it was the next night. The first night I met Sarah Lee Wright and the next night I met Mary Chang. [155]

Q. That is, you mean you first met Sarah Lee Wright? Then the next night, after meeting Sarah, you met Mary Chang? A. Yes.

Q. Was Sarah there when you met Mary Chang? A. Yes, she was there.

Q. Now, was anything mentioned by anyone while you and Sarah Lee Wright and Mary Chang were together in Blanco's bar?

A. Well, the night that I met Mary Chang, well, we, the three of us, were talking together at one of the tables there and Mary asked me about Honolulu, and we were all talking about this and that, you know.

Q. Now, that was Thursday, I believe you said. Was that before or after you had made the telephone call to Honolulu and learned about your mother going to the hospital?

A. That was before I got the telephone call.

Q. Now, after that Thursday, when was the next time that you saw Sarah Lee Wright?

(Testimony of Alice Lii.)

A. I saw her in Blanco's bar.

Q. When after Thursday?

A. I can't remember. It was in the afternoon or in the night.

Q. But was it the next day or more than one day afterwards? Or can you remember?

A. Yes, it was the next day.

Q. And who else was there besides you and Sarah Lee [156] Wright on the Friday, being the day after you received the call from Honolulu?

A. Well, Thursday was the night I got the call. I made the call to Honolulu. And Friday, Friday, I don't remember if I saw Sarah during the afternoon or in the night.

Q. And when you did see her, who all were together with you and Sarah?

A. Sarah was in the bar with that Sampson, that Frank Sampson.

Q. Babe? A. Babe.

Q. And did she join you or you joined her when you got to the bar that Friday night?

A. I don't remember that.

Q. Well, did there come a time during this visit when Sarah said anything to you about coming to Honolulu?

A. Yes, she said that she wants to come to Honolulu.

Q. Do you remember when that was that she first said definitely she wanted to come to Honolulu?

(Testimony of Alice Lii.)

A. I am not sure if she said that Friday night when we went out together.

Q. Had you said anything to her about your plans for returning to Honolulu?

A. Yes, I told her that I was coming back sooner than I expected. [157]

Q. Mrs. Lii, it has been testified that you went to the Pan-American office in San Francisco and got the tickets, portions of which are in evidence——

Mr. Richardson: No, sir, if your Honor please, no testimony as to that. She called up and made a reservation. There has been no proof that she went to the Pan-American office.

Mr. Soares: Well, we can save time. May I have the tickets?

The Court: Will you read that question back?

(The reporter read the last question.)

The Court: I think you are wrong about that.

Mr. Soares: Very well. I will withdraw it.

Q. (By Mr. Soares): Mrs. Lii, I show you Government's Exhibits "A-1" and "A-2," which the witness Velazquez identified as being portions of the tickets issued for the passage of your husband and yourself and Sarah Lee Wright, and yourself. Who, if you know, obtained those tickets from the Pan-American Airlines? (Handing exhibits to the witness.) A. I did.

Q. Whose money paid for the ticket which is Exhibit "A-1" issued to your husband and you?

(Testimony of Alice Lii.)

A. It was our own money.

Q. Whose money paid for the ticket which was issued in the name of Sarah Lee Wright and you? [158]

A. Sarah's money.

Q. It has been testified here that \$560 was paid for these tickets and that of that money \$450 were in Traveler's checks. Did you give any Traveler's checks to anybody in the Pan-American Airlines office for these tickets?

A. Yes, I gave them Traveler's checks.

Q. How much in Traveler's checks?

A. It was \$450.

Q. I think you call this a cash slip, which is Government's Exhibit "B," which shows that a total of \$560 was paid. I believe you now testified that \$450 were your Traveler's checks?

A. That's right.

Q. And did you hand the clerk the difference in cash between \$450 and \$560?

A. Well, I gave him the \$450 in Traveler's checks and the rest was in cash to make up for that money.

Q. Had you received any money from Sarah Lee Wright before you got these tickets?

A. Yes, I did.

Q. How much money had you received from Sarah Lee Wright?

A. It was \$184.

Q. And did she give that to you in cash or some other form? [159]

A. It was in cash.

Q. Now, if you had received cash from Sarah Lee Wright, why did you use your Traveler's checks in part payment of the tickets?

(Testimony of Alice Lii.)

A. Well, since I had that \$450 in Traveler's checks and I was coming home, and Sarah Lee gave me her money for her ticket, so I bought the tickets with my Traveler's checks; since I was coming home I wanted cash. So I bought the tickets with my Traveler's checks.

Q. When did you receive the \$184 from Sarah Lee Wright?

A. Well, it was right after she made, she found out from the Pan-American office the price of coming down here, the price of purchasing the ticket.

Q. Do you know how she found out the price of the ticket? A. Yes, she called up.

Q. Do you know from where she called up?

A. Yes, it was from—in a private, public telephone booth.

Q. What do you mean by a private public telephone booth?

A. It's the telephone booth where the telephone is by itself.

Q. That closes up?

A. Yes, something like that.

Q. And did you see her enter that telephone booth [160] which she used? A. I did.

Q. And where was that telephone booth located with reference to Blanco's bar?

A. Well, it's a service station and the telephone both is by itself.

Q. And where is Blanco's bar with relation to the service station?

(Testimony of Alice Lii.)

A. It's right across the street.

Q. At that time, Mrs. Lii, were you familiar with the use of the dial telephones in San Francisco?

A. No, I was not.

Q. On that occasion did you enter the telephone booth with Sarah Lee Wright?

A. Well, she went in first and I was standing right outside because I couldn't get in there with her.

Q. Were you in a position to hear her conversation over the telephone? A. Yes.

Q. Who, if you know, made the reservations for these tickets, part of which are in evidence in this case? A. Sarah made the reservations for us.

Q. Was Miner Lii there at that time?

A. He wasn't with us at the telephone booth.

Q. Where had you left Miner Lii when you went to the [161] telephone booth across?

A. In Blanco's bar.

Q. Whose idea, if you know, was it to use the telephone booth at the service station across the street from Blanco's bar?

A. It was Sarah's idea.

Q. Did she say anything to indicate why she used that particular telephone booth or telephone, rather than any other?

A. Yes, because she says that for us to go across the street and use the telephone because the telephone in Blanco's bar is right next to the music box, and with the music going on you can't—you can hardly hear anything on the telephone.

(Testimony of Alice Lii.)

Q. After Sarah Lee Wright had made the telephone reservations for these tickets, did she discuss with you plans about getting down to the airport?

A. No, I don't remember if she did.

Q. Let's put it this way: How did you get down to the airport?

A. It was Babe who took us down to the airport.

Q. And what means of transportation did he use?

A. His car.

Q. And who all were in the car that took you to the airport?

A. There was Babe, Sarah and Mary.

Q. Anybody else? [162]

A. And Miner and myself.

Q. And who? A. And Miner and myself.

Q. Five of you? A. Five of us.

Q. And where did you and Miner get into Babe's car the morning or the day that he took you to the airport? Where?

A. Where did he take us?

Q. No, where did you get into the car?

A. Oh, we were sitting in the back.

Q. Where were you just before you got into the car?

A. Down at our hotel.

Q. That is, Babe picked you up at your hotel?

A. That's right.

Q. Was anybody with Babe when he picked you up at your hotel?

A. Yes, he was with Sarah and Mary.

Q. And after picking you up at your hotel, where did you then go?

A. Went down to the airport.

(Testimony of Alice Lii.)

Q. And did you and Miner, Sarah and Mary get into the plane at the airport and come to Honolulu? A. Yes.

Q. Had you said anything to Sarah and Mary about where they were to stay in Honolulu? [163]

A. Well, I told them that, being that they were so nice to us up the mainland, so I told them they could stay with us for a while until they found a place of their own.

Q. And after you arrived in Honolulu, did they stay with you at your home?

A. They stayed with me.

Q. Who left your home first, Sarah or Mary?

A. Sarah.

Q. How long did Sarah stay at your home at the time she left, more or less, if you can remember?

A. About—I remember it was about, maybe a week before Thanksgiving, but it was somewhere before Thanksgiving.

Q. Just before Thanksgiving?

A. It was before Thanksgiving she moved out.

Q. Did Sarah tell you what her plans were when she moved out?

A. Yes, she says that she got a place and that she was going to live out.

Q. Did she tell you where the place was?

A. No, she didn't tell me where it was but after she moved out she called me up and told me where it was.

Q. And what did she tell you?

A. It was at Queen's Hotel.

(Testimony of Alice Lii.)

Q. Was that the same day that she moved out or a later date, if you can remember? [164]

A. The day she moved out.

Q. Pardon?

A. I don't—it wasn't the first day she called me up when she moved out.

The Court: I think this is a good time to take a recess.

(A short recess was taken at 10:45 a.m.)

Mr. Soares: Shall I proceed, your Honor?

The Court: Yes. The jury is in the box—all present.

Q. (By Mr. Soares): Mrs. Lii, did you ever discuss the subject of prostitution with Sarah Lee Wright in San Francisco? A. I did not.

Q. Speak up, please. A. I did not.

Q. Did you know she is a prostitute?

A. No, I didn't know that.

Q. Did you go to San Francisco with your husband for any other purpose than the one you have testified to, namely, for a vacation?

A. The only thing we went up there for was for a vacation.

Q. Did you have any idea of recruiting prostitutes? A. No.

Q. Have you ever had any connection with prostitutes [165] in a commercial way? A. No.

Q. From anything that Sarah Lee Wright told you, or from any other source, did you know anything about the proposition of her coming to Hono-

(Testimony of Alice Lii.)

lulu to practice prostitution in your home and divide the money equally between you and her or you and your husband and her? A. No.

Q. She has testified that you wouldn't leave her out of your sight while she was in Honolulu. Is that true? A. That is not true.

Q. Did you make any effort to control her movements in any way? A. I did not.

Q. And can you say, as a matter of fact, that there were occasions when she was away from your home while you remained at home? Would she go out by herself, in other words? A. She did.

Q. Did you ever accompany her while she lived with you?

A. Well, there was a time when she asked me where was the Brown Derby located at.

Q. Did she tell you why she wanted to know where the Brown Derby was? [166]

A. Yes, she says that she had a girl friend who is working in the Brown Derby.

Q. And did you point out the Brown Derby to her? A. I did.

Q. Did you ever remain at home while Sarah Lee Wright went out somewhere else, leaving you at home?

A. Yes, I was home with my children.

Q. A few or many times?

A. Oh, that happened a lot of times.

Q. And when she left your home telling you she's going to live somewhere else, what time of the day or night did she leave? I don't mean the exact

(Testimony of Alice Lii.)

hour but was it day or night? Do you remember?

A. I think it was in the night.

Q. Can you tell us whether it was late at night or early evening or when?

A. No, I don't think it was too late.

Q. Had there been any difficulty between you and her? A. No.

Q. And when she left were you still friends?

A. Yes, we were.

Q. Had she talked about leaving prior to her actually going?

A. Yes, she did, a few times.

Q. For how long a period had she mentioned the fact [167] that she was going to move out? In other words, Mrs. Lii, how long did you know that she was going to move out before she actually went?

A. I think it was about two weeks. It was about two weeks when she started to tell me about, you know, about looking for a place.

Q. Did I understand you to say earlier in your testimony that in San Francisco you had told her that she could stay with you for a while?

A. For a while.

Q. And I believe you said you also extended the same invitation to Mary Chang? A. Yes.

Mr. Richardson: If your Honor please, that is just as leading as it can be. I object to the form of the question.

Mr. Soares: She has already testified to it. I am just drawing to her attention her testimony.

(Testimony of Alice Lii.)

Q. (By Mr. Soares): How long did Mary Chang stay with you?

A. She stayed with me until she went back to the mainland.

Q. Well, how long would that be?

A. Well, it was in October she stayed with me, up to, I think it was before January.

Q. Well, who left first, Mary Chang or Sarah Lee Wright? [168]

A. Sarah.

Q. Did you have any arrangements with Mary Lee Wright to use your home as a place of prostitution?

A. No.

Q. Did you ever know of Miner Lii making a proposition to Mary Lee Wright to come to Honolulu to practice prostitution?

A. No.

Q. Was that ever discussed between you and Miner?

A. No, it wasn't discussed.

Q. Did Mary Lee Wright ever tell you that?

A. No.

Q. After Mary Lee Wright telephoned to you, saying she was stopping at the Queen's Hotel, did you hear from her direct any more after that, as far as you can remember?

A. Yes, I heard from her.

Q. What's that?

A. I heard from her again.

Q. And how many times did you hear from her after she went to Queen's Hotel?

A. Well, she used to call me up, talk to me over the telephone.

(Testimony of Alice Lii.)

Q. Did you remain friends, friendly during all that period? A. Yes, we did. [169]

Q. Did she tell you anything about what she was doing? A. No, she did not.

Q. I have been saying "Mary Lee Wright." You knew who I was talking about? A. Yes.

Q. It is Sarah Lee Wright? A. Yes.

Q. Did you ever offer to pay Sarah Lee Wright's transportation to Hawaii? A. No.

Q. Did you actually pay Sarah Lee Wright's transportation to Hawaii, or did she pay for it herself? A. She paid for it herself.

Q. And did you have anything to do with her transportation other than handing the clerk the Traveler's checks and money for the tickets and picking up the tickets?

A. No, I had nothing to do with it.

Q. Did you ever receive money from Mary Lee Wright from her prostitution? A. No.

Q. In all the time she was in Honolulu, did you ever receive money from her for any purpose?

A. Not for anything.

Q. And outside of the \$184 which you say she gave you for the ticket, had you ever at any time or any place received [170] any money from Mary Lee Wright?

A. No. The only money I received from her was the \$184 for the ticket.

Mr. Soares: May I take the indictment? (File handed to Mr. Soares.)

Q. Did you on October 9, 1950, or at any time

(Testimony of Alice Lii.)

procure and obtain a ticket from the Pan-American World Airways office in San Francisco for the purpose of bringing Sarah Lee Wright to Honolulu to practice prostitution?

A. No, not for that purpose I didn't buy that ticket.

Q. And when you say you didn't buy the ticket, did you buy the ticket with your money for any purpose?

A. The money she gave me for her ticket. That is the money I bought.

Q. And did she tell you why she wanted to come to Honolulu?

A. Well, she told me she wanted to come down here for—she wanted to see these islands; she wanted to come down for a vacation.

Mr. Soares: You may cross-examine.

Cross-Examination

By Mr. Richardson:

Q. Mrs. Lii, you all still reside at 1324 Gulick Street? A. That's right.

Q. I believe you stated on direct examination you lived [171] there about five years?

A. That's right.

Q. Is that right? Now, when were you and your husband Miner Lii married?

A. We were first married in 1945.

Q. And you were divorced?

A. We were divorced.

(Testimony of Alice Lii.)

Q. Do you remember the date of the divorce?

A. I remember the month and the year.

Q. Well, as a matter of fact, it was April 12, 1948, was it not? Does that sound about right?

A. I don't remember what day it was but I know it was in April, 1948.

Q. It was in April, 1948? A. Yes.

Q. And then, when did you re-marry?

A. In March or April after I came back from the mainland.

Q. That was in March of this year, was it not? March of 1951? A. Yes.

Q. And the last marriage, Mrs. Lii, was after this indictment had been returned, was it not?

A. That's right.

Mr. Soares: We object to that as incompetent, irrelevant [172] and immaterial.

Mr. Richardson: Well, it is a matter of record.

Mr. Soares: We don't deny it. She has admitted it. But the date is there if it serves any useful purpose with relation to the indictment itself already before the jury.

The Court: Well, she testified that she was married to him and had so many children, and so forth. I think the question is perfectly legitimate.

Mr. Soares: Save an exception.

The Court: Re-married when, March of what year?

Q. (By Mr. Richardson): Was it March 28, 1951, do you recall, Mrs. Lii?

(Testimony of Alice Lii.)

A. I don't know if it was on the 28th or not. But it was somewhere in March.

Q. March of this year? A. Yes.

Q. Now, Mrs. Lii, you have three children?

A. That's right.

Q. Can you give me their ages again?

A. My baby is a year old. My second one will be three years old. My girl is—she will be nine.

Q. Now, Mrs. Lii, you don't work, is that correct? You stay home and kept house?

A. That's right.

Q. And have you been doing that the entire five years [173] that you have lived up on Gulick Street?

A. No. I was working while living at the address.

Q. Working when? When is the last time you worked? A. I think it was in '47.

Q. Forty-seven? A. That's right.

Q. And for the last four years or thereabouts you have stayed home and kept house?

A. That's right.

Q. Now, what sort of business is your husband in? What does he do?

A. Well, at the present he is not doing anything.

Q. When is the last time he worked?

A. Oh, he was a seaman before but he hasn't been shipping out quite some time.

Q. Well, now, just about how long was it. Give us your best recollection? How long has it been since he worked?

A. About ten years, maybe more.

(Testimony of Alice Lii.)

Q. About ten years? A. Yes.

Q. Now, Mrs. Lii, you all own that property up on Gulick Street? A. Yes.

Q. Mrs. Lii, do you still have the Cadillac car that your husband drove last year? [174]

Mr. Soares: Just a minute. There is no evidence that he drove a car last year or at any time, or that it was her car so that she would still have it.

Mr. Richardson: I will withdraw that question.

Q. Your maiden name was Alice Woo, was it not? A. That's right.

Q. Now, in 1950, a 1950 Cadillac sedan was registered in your name, was it not?

Mr. Soares: We object to that as not cross-examination. Nothing was said about her source of income or property that she owned or anything.

Mr. Richardson: It is material in this sense—

The Court: It is following the same line that you did, I assume. It is going into the witness' credibility.

Mr. Soares: Going into what? I didn't hear.

The Court: Credibility.

Mr. Soares: Credibility of an ownership of a car that wasn't referred to? All my questions that your Honor refers to related to questions that Counsel had asked the witness. The credibility was directed to new matter brought out.

Mr. Richardson: She hasn't worked for four years and her husband hasn't worked for ten. It is material in that sense.

Mr. Soares: My wife hasn't worked for thirty-

(Testimony of Alice Lii.)

three, and I dare you to say that she gets her money improperly. [175]

Mr. Richardson: May I proceed?

The Court: What is before the Court? Yes, go ahead.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): Did you answer that question?

A. I don't remember the question.

Q. In 1950 did you have a 1950 Cadillac sedan registered in your name? A. Yes, there was.

Q. Now, in 1949 you had a Lincoln Cosmopolitan sedan in your name?

Mr. Soares: May we have an objection and exception to this line of questions all the way through, your Honor, without making the objection each time?

The Court: Yes. Same ruling.

Mr. Richardson (to the witness): That's correct, is it not?

The Court: After this you had better make specific objections.

Mr. Soares: Very well. We object to this question as incompetent, immaterial, irrelevant, and not proper cross-examination.

The Court: The last question has been answered?

Q. (By Mr. Richardson): Did you answer, Mrs. Lii? [176] A. What was the last question?

Q. About the 1949 Lincoln Cosmopolitan sedan.

A. It was registered.

Q. Registered in your name? A. Yes.

(Testimony of Alice Lii.)

Q. Now, during the five years that you and Miner Lii have lived up in Gulick Street, who else has lived in the house with you?

A. In the house? Well, there was——

Q. Please speak a little bit louder. I'm afraid the jury can't all hear.

A. There was my husband, my three children, and we had his brother stay with us.

Q. Miner's brother? A. Miner's brother.

Q. Is that Dodo? A. No, another brother.

Q. He has a brother named Lawrence also, does he not? A. Lawrence, yes.

Q. Which was the one that stayed?

A. Joe.

Q. Joe? A. Joe.

Q. Who else stayed there?

A. Well, there's another brother that comes in from [177] sea when he comes in; he spent a few nights in the house and goes back again.

Q. Well, now, have there been any girls stay up there, Miss Lii?

A. Well, the only time there was when we had Sarah Lee Wright and Mary Chang.

Q. That's the only time? That's the only time that any girls have stayed up there for any length of time, is that correct?

A. And also there was this other brother, Teddy, who was staying with us.

Q. Well, I am speaking now of girls. What other girls have stayed there besides Sarah Lee Wright and Alice Chang?

(Testimony of Alice Lii.)

A. Well, while my brother-in-law was staying with us, he used to bring this girl with him all the time, who was going with him.

Q. Wasn't she living with you there, or would he just bring her there?

A. Well, she's there sometimes.

Q. Do you remember her name?

A. Yes, it was Barbara.

Q. Barbara? Do you know a Miss Lorraine Staunton? A. Lorraine Staunton?

Q. Lorraine Staunton.

A. That name sounds familiar to me. [178]

Q. Well, do you recall that she stayed up there for a while? A. Not that I remember.

Q. You don't remember that? A. No.

Q. All right. Do you know a Barbara Andrade?

A. Yes, I know Barbara Andrade.

Q. Is that the same Barbara that you spoke of a while ago? A. Yes.

Q. She stayed up there for a while?

A. Oh, yes.

Q. Stayed there a year? A. About that.

Q. How long did Miss Staunton—you say, you don't recall Miss Staunton stayed there or not—was that your answer? A. Not that I remember.

Q. All right, Miss Lii. Now, you went to San Francisco for a vacation? A. That's right.

Q. How long were you there before you got this telephone call with reference to your mother?

A. I was there from Monday, Thursday—Thurs-

(Testimony of Alice Lii.)

day I made a call. That's when I found out my mother——

Q. You made the call from San Francisco to Honolulu? [179] A. That's right.

Q. And whom did you call?

A. The woman who was taking care of my children.

Q. And you didn't call directly to your mother, then? A. No.

Q. At that time was your mother in the hospital?

A. She was.

Q. And when you called with reference to your children, then you found that your mother was in the hospital? A. That's right.

Q. Was that Queen's Hospital?

A. Queen's.

Q. And what is your mother's name, Mrs. Lii?

A. It is Mrs. Kang Sun Yee, K-a-n-g, S-u-n, Y-e-e.

Q. That is the name she was registered in the hospital——

Mr. Soares: We object to that, if the Court please. It is leading and suggestive, calling for a conclusion.

Mr. Richardson: It couldn't be leading on cross-examination.

Mr. Soares: True enough, it is not a legitimate objection on cross-examination, although it is leading. It could be leading but——

Mr. Richardson: It couldn't be leading on cross-examination.

(Testimony of Alice Lii.)

Mr. Soares: Let's not quibble. Leading questions are [180] permissible on cross-examination. The question is leading. But what we object to, if the Court please, is calling for a conclusion of the witness and based on hearsay, because she was not here when her mother entered into the hospital, and nothing was shown as to that, and it assumes something not in evidence, namely, that she knew under what name her mother was admitted to the hospital.

Mr. Richardson: I will ask her if she knows under what name.

Q. (By Mr. Richardson): Do you know what name your mother used in the hospital?

A. I don't know.

Q. Did your mother use the name of Mrs. Kang Sun Yee generally out here?

A. She used that name.

Q. Did you ever know of her to use another name?

A. Not unless she went under my father's name.

Q. Now, your father has been dead for some years, has he not?

A. That's right.

Q. What was your father's name?

A. It is Woo.

Q. W-o-o? A. W-o-o. [181]

Q. Did your mother re-marry, or how did she come to use the name of Kang Sun Yee?

A. That is her maiden name.

Q. That is her maiden name? A. Yes.

Q. Now, you got this call, as I understood from you, on a Thursday? A. It was Thursday.

(Testimony of Alice Lii.)

Q. And you left the following Monday and came back to Honolulu? A. That's right.

Q. Now, Mrs. Lii, the first night that you were there in San Francisco, you didn't meet Sarah Lee Wright? A. No.

Q. That is correct, isn't it? You met Junior?

A. I met Junior.

Q. Junior is Frank Sampson's brother, is he not?

A. Yes.

Q. And both Junior and Frank are old friends of your husband Miner, isn't that correct?

A. That's right.

Q. Now, that was at Blanco's bar where you met them the first time you were there?

A. Blanco's bar.

Q. And that must have been on a Monday night, then, [182] if it was the first day you were there?

A. That's right.

Q. And the second night that you were there, you did meet Sarah Lee Wright? A. I did.

Q. And where did you meet her that night?

A. In Blanco's bar.

Q. That is the first time you had ever seen her in all your life? A. Sarah Lee Wright?

Q. Yes. A. Yes.

Q. You were with Miner and Junior and Junior's girl friend, is that correct?

A. On what night?

Q. On the night that you met Sarah Lee.

A. The night that I met Sarah Lee Wright, that

(Testimony of Alice Lii.)

was in the bar. But Junior wasn't with us at that time.

Q. Junior was not with you? Well, who was with you besides Miner Lii?

A. Miner, myself, and Babe introduced us to Sarah.

Q. Oh, you met Babe instead of Junior that night?

A. Well, after a while we went out with Junior.

Q. Went to another bar?

A. In Blanco's bar. [183]

Q. Well, didn't you also state you went to other night clubs that night later on?

A. On that same night?

Q. On the night that you met Sarah after leaving Blanco's bar, didn't you all go to other bars? Didn't you go to other night clubs?

A. I went to—yes.

Q. Did you go in Junior's car?

A. Well, I went in a car Junior was driving.

Q. He was driving the car?

A. Yes.

Q. Now, when you first met Sarah on the first night you met Sarah, do you recall you all going out to the car and sitting in the car and having a conversation? A. No.

Q. You don't remember that? A. No.

Q. Junior did have a car?

A. Well, the car we all went in?

Q. That's right, the car that he took you around to other places that night.

(Testimony of Alice Lii.)

A. That's right.

Q. And the car was right there in Blanco's bar?

A. Well, I don't know where the car was at, but all I know, we met him outside the car. We went in the car and [184] took off.

Q. You don't recall going out and sitting in the car with Junior, Sarah Lee, Miner and yourself and having a conversation?

A. No, we didn't go in no cars with Sarah Lee Wright.

Q. Later on when you did go to other night clubs with Junior, that is, in Junior's car, was Sarah Lee with you?

A. No, she wasn't with us.

Q. She was not? A. No.

Q. Well, how long do you suppose that you talked to her in all that night, just as a matter of minutes, 30 minutes, 40 minutes or what?

A. Well, the first night I met her I talked about, oh, about a half hour.

Q. Well, was anything said about coming to Honolulu at that time?

A. No, we didn't talk about that. She asked what, she asked me about Honolulu, how was the place.

Q. She asked about it? A. Yes.

Q. But nothing was said at that time about her coming?

A. No, she didn't mention anything.

Q. All right. That was on a Tuesday night, is that correct? [185] A. That's right.

(Testimony of Alice Lii.)

Q. Now, when did you see her the next time?

A. On Wednesday night.

Q. On Wednesday night? And was that also at Blanco's bar? A. That's right.

Q. And what, if anything, was said about coming to Honolulu on that night?

A. That Wednesday night, that is the night when I was talking to Sarah. Sarah and I were talking and that's when I met Mary Chang.

Q. You met Mary Chang the same night?

A. On the next night.

Q. That is the following night after you met Sarah Lee you met Mary Chang?

A. That's right.

Q. Well, were you all talking to both of them about coming to Honolulu?

A. Well, we were all talking about Honolulu.

Q. Well, were you talking about—was Sarah Lee and Mary Chang, were they talking about coming over here?

A. Well, they had that in their mind; they said they don't mind coming down to Honolulu.

Q. They said they didn't mind coming?

A. They wanted to come here just for a vacation, you [186] know, or something.

Q. Did you tell them when you were coming over? A. No.

Q. Nothing was said at that time about them coming back with you then?

Mr. Soares: Meaning the Wednesday night?

Mr. Richardson: Yes, on the Wednesday night.

(Testimony of Alice Lii.)

Q. Was anything said about Mary and Sarah coming back with you?

A. No, I don't think so.

Q. All right. Now, how long did you talk to her on that night, to Sarah Lee?

A. It wasn't too long.

Q. Just a short conversation? A. Short.

Q. When did you see her the next time?

A. It was the next night I saw her. That was Thursday night.

Q. You saw her again Thursday night?

A. I saw her Thursday.

Q. That was at Blanco's bar? What was said at that time about coming to Honolulu?

A. Well——

Mr. Soares: I object to that as assuming something not in evidence that anything was said. [187]

Mr. Richardson: I will rephrase it.

Q. If anything was said about coming to Honolulu, what was it?

Q. You saw her again Thursday night?

Q. This is on Thursday.

A. Gee, I can't remember.

Q. Well, let me ask you this: Was anything said about coming to Honolulu, that is, coming to Honolulu, not coming back?

A. No, I don't remember if I said anything about coming back or not.

Q. Then you didn't tell them at that time when you were returning, did you?

A. Well, I think I remember telling them that

(Testimony of Alice Lii.)

I was going to stay there for about three weeks or a month.

Q. Stay there about three weeks? Well, now, up to that point, Mrs. Lii, had anything been said about them coming with you to Honolulu or were they just coming, just talking about wanting to go for a vacation? A. On the same day?

Q. On Thursday night. What I am trying to get at is, when did you first start talking about coming together, that is, the three of you, the two of you, whoever was talking about it?

A. I don't remember. It was on—I don't remember if it [188] was on a Thursday night or not.

Q. You say it was not on Thursday?

A. I don't remember.

Q. I see. Well, was that still at Blanco's bar? I mean where you all were talking. A. Yes.

Q. And what did you do after the conversation? Did you all go somewhere together?

A. We went out together.

Q. To another night club?

A. That's right.

Q. Was Miner with you? A. Yes.

Q. Is that this night that I think you used the words to Mr. Soares "the party broke up at some bar, at Blanco's bar," do you recall?

A. On what night was that?

Q. This is still Thursday night.

A. I don't remember.

Q. I beg your pardon?

A. I can't remember that.

(Testimony of Alice Lii.)

Q. Well, now, it was on Thursday night that you made the call to Honolulu, wasn't it?

A. That's right.

Q. And what time was that? Was that after you left [189] the bar? A. Yes.

Q. Well, about what time of the night was it?

A. Well, when I got home, I went up to the hotel, I mean——

Q. Was it late at night?

A. It could have been before 12 or a little after 12. I don't know the time.

Q. A little after 12 that you called——

A. It could have been before that or a little after. But I can't remember the exact time.

Q. Well, it was around 12 that you called to find out about your children and found that your mother was in the hospital, is that right?

A. It was around that time. I can't say for sure it was.

Q. All right, now. When did you see Sarah the next time? A. Friday.

Q. And what time of day was that?

A. Well, I don't remember. I am not sure it was in the afternoon or it was in the night.

Q. Well, what, if anything, was said about coming to Honolulu at that time?

A. Well, she told me she had a mind to coming to Honolulu. [190] Then I told her, I think I told her that I was coming back sooner than what I expected.

(Testimony of Alice Lii.)

Q. Well, did you tell her when you were going to come back?

A. I don't remember if I told her when I was coming back.

Q. You don't remember? Was that Friday night?

A. It could have been in the night or in the afternoon. I can't remember now.

Q. Was Mary Chang there when you had this conversation?

A. Mary Chang? No, I don't think she was there.

Q. You say you can't recall whether that was Friday afternoon or Friday night, is that correct?

A. That's right.

Q. Well, now, didn't you state, Mrs. Lii, that Sarah made a telephone call Friday afternoon and made a reservation for the tickets?

A. Well, I told you I didn't remember whether it was in the night or afternoon.

Q. Well, if you remember that she made the telephone call in the afternoon, why is it you can't remember whether you saw her Friday afternoon or Friday night?

Mr. Soares: We object to that as argumentative, if the Court please. She hasn't been positive that she saw her Friday afternoon. [191]

Mr. Richardson: She was positive about the reservation call.

Mr. Soares: Yes, that was fixed in her mind. She didn't know how to use the telephone. There is nothing about the incident either on direct or cross-examination so far to indicate anything to fix

(Testimony of Alice Lii.)

it in her mind whether it was afternoon or night. Counsel is simply arguing with the witness when he asks this question.

The Court: Overruled. Proceed.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): Why is it that you can't remember whether you saw her in the afternoon or at night, Mrs. Lii, if you are so positive that she called for the reservations in the afternoon?

A. I remember it was in the day that she made the reservation.

Q. Mrs. Lii, as a matter of fact, she didn't call for the reservation, did she? A. She did.

Q. And you were there and you heard her?

A. I did.

Q. You were standing by the telephone booth?

A. I was.

Q. What is the difference in the telephones between [192] San Francisco and Honolulu?

A. Well, I think you have to dial the first two letters first before you dial the number. Something like that.

Q. And you never used a telephone like that before?

A. I never used a telephone like that before.

Q. You used a dial telephone before, didn't you?

A. Well, the telephone that we have down here, that's the kind of telephone I use.

Q. That is a dial telephone?

A. That's right.

Q. And you say you couldn't make the call there

(Testimony of Alice Lii.)

because you didn't know how to manipulate the dial? A. No, I didn't know how.

Q. That was on Friday and you left there Monday morning and came back here? A. I did.

Q. Did you see her any more between Friday and Monday morning?

A. Sunday night, Sunday night I saw her.

Q. At a bar? At some bar there?

A. Well, at Blanco's bar.

Q. At Blanco's bar? Well, at that time was anything further said about her coming to Honolulu?

A. Well, that is, the tickets were all arranged and everything like that, and she had her own ticket. I had my [193] own, and——

Q. Oh, she had a ticket at that time? Did you say she had her ticket and you had yours?

A. Well, after she had made the reservation, I went down to pick up the tickets, so I gave her her ticket and I had my own.

Q. And when did you get this \$184 from——

A. Her ticket. She gave me the \$184 for her ticket.

Q. When did she give you that?

A. The day she made the telephone call.

Q. The day she made the telephone call?

A. That's right.

Q. Now, when was it decided that Mary Chang was going to come?

A. Oh, I don't know. She spoke about coming down to Honolulu but I didn't know if she was

(Testimony of Alice Lii.)

coming down or not. But I invited her over to my home.

Q. You invited her over? A. I did.

Q. And who paid for her ticket?

A. She paid her own.

Q. She paid her own way?

A. That's right.

Q. And these girls whom you only met on only three or four different occasions, you invited them to come over here [194] and stay with you in Honolulu? A. That's right.

Q. Now, Mary Chang stayed out at your house until, you said, shortly before January, I believe?

A. Yes.

Q. And Sarah left in November around Thanksgiving? A. Yes.

Q. And you say nothing was ever said in Honolulu about Sarah coming over here to practice prostitution? A. Nothing was said like that.

Q. No arrangements were made for you to pay her and Miner half of the money she made?

A. No.

Q. That was never mentioned?

A. That was never mentioned.

Q. Now, I asked you about a minute ago about Lorraine Staunton, do you recall?

A. Like I told you, that name sounds familiar.

Q. But you are not sure whether she ever stayed at your house or not?

A. Well, I know no one there by that name was staying at my house.

(Testimony of Alice Lii.)

Q. You deny that in April of 1950 Lorraine Staunton stayed at your property up there on Gulick Street for three days as a prostitute and gave half the money to you and Miner? [195]

A. There was nothing like that happened.

Q. That didn't happen? A. No.

Q. Do you recall a Barbara Andrade?

A. Yes, I remember Barbara.

Q. Who stayed at your house?

A. Yes, she was staying there.

Q. I believe that you said that you didn't recall if she stayed there as much as a year. That is true, isn't it? A. She was there for about a year.

Q. I beg your pardon? I thought you said she was not before. Do you deny that Barbara Andrade worked up there as a prostitute?

A. No.

Q. That didn't happen? A. No.

Q. Now, Mrs. Lii, you were arrested on December 30th of this year, charged with interfering with the duties of a police officer——

Mr. Soares: We object to that as incompetent, irrelevant and immaterial and not proper cross-examination on the question of arrest.

Mr. Richardson: If your Honor please, he asked Mrs. Wright where she had been charged with offenses that weren't even taken to court. [196]

Mr. Soares: I don't know about having done that, if the Court please, but if I had that wouldn't excuse Counsel committing the same error now. If

(Testimony of Alice Lii.)

I did, I don't recall it. But Counsel certainly didn't object to it.

Mr. Richardson: I certainly did.

Mr. Soares: I submit that it is not a proper question, a mere charge or arrest of a person. That tends to prove——

Q. (By Mr. Richardson): If you were arrested on that charge and received a suspended sentence of 13 months on the charge of interfering with the duties of a police officer——

Mr. Soares: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): Is that true, Mrs. Lii? A. That is true.

Q. On the occasion of that arrest it was when an officer went to your house with a warrant charging Miner with soliciting, wasn't it?

Mr. Soares: We object to that as certainly incompetent, irrelevant and immaterial, and prejudicial, if the Court please, and not proper cross-examination and can serve no purpose except an attempt to improperly prejudice the jury. [197]

The Court: Sustained.

Q. (By Mr. Richardson): Now, this time that you brought Sarah Lee—I mean, not brought but came to Honolulu with Sarah Lee and Mary Chang, gave them the privilege of staying at your house without receiving a penny for it, is that the only time you have shown such friendship to these other

(Testimony of Alice Lii.)

girls? It is the only time you have taken girls like that in, Mrs. Lii, without any cost to them whatsoever and let them stay in your house, one of them for almost three months?

A. I told her she could stay at my house for a while, but I didn't expect her to stay that long, and I couldn't very well tell her to get out of my house.

Q. And Mary Chang stayed there until January?

A. Mary Chang stayed there.

Q. And Sarah Lee stayed there for seven weeks?

A. About that.

Q. Mrs. Lii, you stated that you haven't worked for four years and Miner hadn't worked for ten. Where did you all get the money to take this trip?

A. Well, I had some money saved.

Q. Saved from when you were working four years ago?

A. Oh, I used to—when I was working during the years that I used to work.

Q. What type of work did you used to do? [198]

A. Well, I used to work in a bar, and I used to work down in the cannery before.

Q. Down where? A. Down in the cannery.

Q. The cannery? A. That's right.

Q. Working at the cannery you bought a Cadillac, a Lincoln, and can take a vacation trip to the mainland when you want to?

Mr. Soares: Just a minute. I object to that as argumentative.

Mr. Richardson: It is in the record.

Mr. Soares: Certainly counsel can argue all he

(Testimony of Alice Lii.)

wants to when he goes to the jury from what is on the record. The whole story isn't in the record yet, if the Court please.

Mr. Richardson: The reason I said it was in the record was because Mr. Soares said it is argumentative; if it is not in the record, it is not argumentative——

Mr. Soares: Oh, nonsense. The question is argumentative; he is arguing with the witness.

The Court: I didn't understand it was a question. Proceed.

Mr. Soares: Your Honor's ruling is that there is no question?

The Court: I didn't take it to be a question.

Mr. Soares: Very well.

The Court: It sounded to me like a statement.

Q. (By Mr. Richardson): Do you know how many times Miner has been married before?

Mr. Soares: We object to this as incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: I think that is just going into some matters——

Mr. Richardson: I will withdraw it.

Q. Mrs. Lii, during the time, the period between the two marriages that you and Miner contracted, were you living with him then? A. Yes.

Mr. Richardson: I think that's all.

(Testimony of Alice Lii.)

Redirect Examination

By Mr. Soares:

Q. The fact of the matter is, Mrs. Lii, from the time Miner filed a suit against you down to the present time you have always lived together as husband and wife? A. That's right.

Q. Did you contest the case? Did you contest the divorce case? A. I did not.

Q. And the fact that he went into court and obtained a divorce, did that interrupt your marital, your relations [200] with him all in any way?

A. No.

Q. Now, with reference to your having received a suspended sentence on a charge of interfering with a police officer, is that case over yet?

A. No, I had it appealed.

Q. Even though your sentence was suspended?

A. That's right.

Q. Which might have meant you paid a fine or went to jail, you still appealed the case?

A. That's right.

Mr. Richardson: That is argumentative if any question ever was.

Mr. Soares: That is a statement of fact.

The Court: Well, I suppose that is a statement of fact. I don't know whether it is preliminary to some question or not.

Mr. Soares: That's right, if the Court please. Your Honor is quite right.

Q. (By Mr. Soares): With that statement of

(Testimony of Alice Lii.)

fact in mind, I will ask you if it isn't true that there is also pending in the District Court of Honolulu charges against the police officers who claimed you interfered with them, brought by you and Miner Lii for their assaulting both of you and your little baby or [201] child? A. That's right.

Q. And I will ask you if it isn't a fact that one of the police officers involved at that time was Chris Faria? A. That's right.

Mr. Richardson: I object to that, if your Honor please. It doesn't make any difference about that.

Q. (By Mr. Soares): And I will ask you if it isn't a fact that Chris Faria left town before the warrant could be served on him.

A. That's right.

Q. Now, you say Miner had a brother named Joe who is a seaman—is that the one?

A. No, that is not the one.

Q. Well, in connection with Barbara Andrade, when you mentioned her first, you said something about one of Miner's brothers. Which brother was that? A. That was Teddy.

Q. And you said that Barbara stayed with you and Miner about a year? A. That's right.

Q. Did she stay in the same house in which you stayed? A. With us.

Q. And where was Teddy staying, do you know?

A. He was staying with us, too. [202]

Q. In the same house?

A. The same. You mean in the same house or——

Q. That's what I am trying to find out. Was it

(Testimony of Alice Lii.)

the same house or some other place in the same yard?

A. Well, it wasn't in the same house but it was in the yard, the same block, though.

Q. The same lot? A. Lot.

Q. What type of a place was it that you speak of now? A. It is a side of the house.

Q. Can you describe it any more?

A. Well, there's a room out there.

Q. What's that?

A. There's a room out there on the side of the house.

Q. Has it any connection with a garage in any way?

A. Well, it's supposed to be a garage but I usually use that for my washroom where I do my laundry and ironing and things like that.

Q. It was originally a garage?

A. That's right.

Q. And who do you say stayed there?

A. Teddy was staying there.

Q. Did anybody stay with him?

A. There was Barbara.

Q. In that room? [203]

A. Yes, she stayed with him and she stays with me inside.

Q. Pardon? I didn't hear that.

A. She stays in and out like that.

Q. She stayed in both places? A. Yes.

Q. Would you say whether or not Barbara was Teddy's girl friend?

(Testimony of Alice Lii.)

A. That's right.

Q. Did you ever have a conversation in a car outside of Blanco's bar such as Sarah Lee Wright described in her testimony? A. No.

Q. Or did you have a conversation in any car at any place when Sarah Lee Wright was present?

A. No.

Mr. Soares: May I consult with my clients for just a moment?

(Counsel and Defendants confer.)

Q. You referred to a Cadillac car. What model car was it? A. Model——

Mr. Richardson: Your Honor, she testified it was a 1950.

Mr. Soares: Oh, no, she said it was registered in 1950.

Mr. Richardson: I asked her that question.

Mr. Soares: Can't I ask her again? [204]

Mr. Richardson: Oh, no, you can't.

Mr. Soares: Only you can ask those kind of questions?

Mr. Richardson: The question was asked and answered.

Mr. Soares: Asked and answered on redirect examination? What other nonsense——

The Court: Go ahead and ask her. She said it was a 1950 Cadillac.

Q. (By Mr. Soares): There was a 1950 Cadillac registered in your name? A. There was.

Q. And how long did that car continue to be registered in your name?

(Testimony of Alice Lii.)

A. Up to—I don't remember when.

Q. Well, withdraw that if you can't remember.
What became of it?

A. Well, I guess it's been sold.

Q. What's that? A. It's been sold.

Q. Well, what did you do? Did you operate that
car at all? A. I drive that car.

Q. And what did you do with it?

A. Turned it back to the owner.

Q. Who was the owner?

A. It was Joe. [205]

Q. Joe who? A. His brother Joe.

Q. What? A. His brother Joe.

Q. It was Joe Lii's car? A. That's right.

Q. And registered in your name?

A. That's right.

Q. You didn't buy that car? A. No.

Q. And when did you turn it back to Joe?

A. I can't remember the date or the month.

Q. Now, this other car that was referred to, the
1949 Lincoln; which was registered in your name
first, the Cadillac or the Lincoln?

A. The Lincoln.

Q. And what became of that?

A. It's been sold.

Q. What's that? A. It's been sold.

Q. Sold? A. That's right.

Q. When was it sold?

A. I think it was in 1950. I'm not too sure.

Q. Did you buy the Lincoln car? [206]

A. Well, it was registered under my name.

(Testimony of Alice Lii.)

Q. Well, whose car was it actually?

A. Whose car? The Lincoln?

Q. Yes. A. That was Joe's car.

Q. Do you know whether the Lincoln was turned in on the Cadillac? A. That's right.

Q. You didn't put out any money for either of these cars? A. No.

Mr. Soares: No further questions.

Mr. Richardson: Nothing further.

(Court and Counsel confer.)

The Court: The Court recesses this case until nine o'clock tomorrow morning. The jury will appear at that time. And in the meantime you will recall what I said to you about the case not being over yet, so keep your own counsel and don't let anybody tell you their impressions or what they think the facts are or talk to you in any way about the case. We will adjourn until tomorrow morning, until nine o'clock.

(The Court adjourned at 12:00 noon.) [207]

May 23, 1951

(The Court convened at 9:15 a.m.)

The Clerk: Criminal No. 10,419, United States of America versus Miner Lii and Alice Lii, for further trial.

The Court: The jurymen are all present in the box. You may proceed.

Mr. Soares: If the Court please, I'd like leave

(Testimony of Alice Lii.)

to have Frank "Babe" Sampson return to the stand for further cross-examination.

Mr. Richardson: If your Honor please, that witness has returned to the mainland. Mr. Soares said nothing to me about wanting him back, after his other testimony, and he is not here.

Mr. Soares: That is true enough, if the Court please. The questions that I wanted to cross-examine him on are based on information that I received since he was on the stand.

The Court: You say he has gone?

Mr. Richardson: Yes, he has.

The Court: When did he go?

Mr. Richardson: My information is that he left the night after he testified.

The Court: Well, that's the end of him.

Mr. Soares: In that case we rest, if the Court please.

The Court: Did you know, Counsel, that he had gone? [208]

Mr. Soares: Did I know he was gone? Not until this morning when I said to Mr. Richardson that I'd like to call him, and Mr. Richardson informed me. I made the statement so that the record will show we wanted to cross-examine him further. I purposely refrained from saying that I knew he was gone because that was the information I received from Mr. Richardson, and I thought it should come from him, not from me.

The Court: All right. The Defense rests. Any rebuttal?

Mr. Richardson: Yes, if your Honor please, I'd like to put on some rebuttal.

SARAH LEE WRIGHT

a witness on behalf of the Plaintiff, having previously been sworn, was called on rebuttal and testified as follows:

Direct Examination

By Mr. Richardson:

Q. You are the same Sarah Lee Wright who testified the other day, are you not? A. Yes.

Q. Now, Miss Wright, it has been testified here by one of the Defendants—I beg your pardon—by a witness for the Defense, that you were seen on the Island of Kauai. Had you ever been on the Island of Kauai in your life?

A. I have never been on that island. [209]

Mr. Soares: That is not rebuttal, if the Court please. She already denied that. I move that the testimony be stricken as not proper rebuttal.

The Court: Denied.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): Miss Wright, with reference to your meetings in San Francisco with Alice Lii and Miner Lii, when was the first time anything was said with reference to your coming here to work as a prostitute?

Mr. Soares: We object to this, if the Court please, as not proper rebuttal. All that was testified to and it can serve no purpose except to prejudice the Defendant's case.

(Testimony of Sarah Lee Wright.)

The Court: I didn't get that.

(The reporter read the last question.)

Mr. Richardson: If your Honor please, it has been denied—

The Court: Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): Will you answer that? A. The first night I met them.

Q. The first night you met them?

A. Yes, sir.

Q. Now, Miss Wright, did you give Alice Lii \$184 to pay for your ticket over here? [210]

A. No, sir, because I didn't have \$184.

Q. Now, you got here, I believe, on a Monday?

A. Yes, sir.

Mr. Soares: We object to all this re-hash of the case in chief, if the Court please. I move it be stricken.

The Court: Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): When did you start to work for Miner Lii and Alice Lii as a prostitute?

Mr. Soares: We object to this, if the Court please, as not proper rebuttal and it can serve no purpose except to prejudice the Defendant's case.

The Court: That is not proper rebuttal.

Mr. Richardson: If your Honor please, they have denied that this girl or any girl ever worked for them as a prostitute. I want to show just how she worked for them as a prostitute and how long

(Testimony of Sarah Lee Wright.)

she worked for them and what she made as a prostitute.

The Court: All right.

Mr. Soares: The Court allows the question?

The Court: Yes.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): When did you start to work for them? [211]

A. I got there on Monday and started on Tuesday in the afternoon.

Q. Now, what was the method of operation up there? How did you work for them as a prostitute?

Mr. Soares: We object to this as not proper rebuttal and incompetent, irrelevant and immaterial in any instance.

The Court: Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): How did the customers—how did you get your customers?

A. They just came voluntarily.

Q. They came up to the house?

A. They knew what it was so they came of their own accord.

A. And how much did you make with each customer?

Mr. Soares: We object to this as incompetent, irrelevant and immaterial already testified to, and not proper rebuttal.

The Court: Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): How much?

(Testimony of Sarah Lee Wright.)

A. Miner Lii collected \$12 from each fellow.

The Court: Who?

The Witness: Miner Lii.

Q. When a man would come in to see you, did he pay the [212] money to you? A. No, sir.

Mr. Soares: We object to this as leading and suggestive and not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

Mr. Soares: Save an exception.

A. No, sir, he did not pay me.

Q. (By Mr. Richardson): Whom did you pay?

A. He paid Miner Lii.

Q. The money never came through your hands?

Mr. Soares: I move that that be stricken until we can repeat the objection.

The Court: That answer is stricken for the time being. Make the objection.

Mr. Soares: We renew the objection that it is incompetent, irrelevant and immaterial and not tending to prove or disprove any issue in this case, and not proper rebuttal, and already asked and answered in the case in chief.

The Court: Overruled. You may answer the question.

Mr. Soares: Save an exception.

Q. (By Mr. Richardson): Miss Wright, the money was paid to Miner Lii?

Mr. Soares: We object to it as leading and suggestive and not tending to prove or disprove any of

(Testimony of Sarah Lee Wright.)

the issues in this [213] case, and already asked and answered in the case in chief.

The Court: That is true.

Mr. Richardson: I will withdraw that question.

Q. Miss Wright, when did you get your money?

A. At the end——

Mr. Soares: Objected to as incompetent, irrelevant and immaterial and not tending to prove or disprove any issue in this case and already asked and answered, and not proper rebuttal.

The Court: Overruled.

Mr. Soares: Save an exception.

A. At the end of the night Mrs. Lii would split with me.

Q. (By Mr. Richardson): You say Mrs. Lii?

A. Yes.

Q. I believe the term in common usage is "turn a trick," is that correct? A. Yes.

Q. How many tricks would you turn a night up there? On an average?

Mr. Soares: Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

Mr. Soares: Save an exception. [214]

A. On an average about ten.

Mr. Soares: How many did you say?

(The reporter read the last answer.)

(Testimony of Sarah Lee Wright.)

Q. (By Mr. Richardson): How long did you stay there?

Mr. Soares: We object to that. It has already been asked and answered, and it is not proper rebuttal.

The Court: That is true.

Q. (By Mr. Richardson): How much money do you estimate you turned over to Miner and Alice Lii during the time you worked there?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal, and can serve only to prejudice the Defendants' case in the eyes of the jury.

Mr. Richardson: If your Honor please, the Defendant has testified that no money was turned over to them.

Mr. Soares: And she testified in chief that money was turned over.

The Court: The question is objectionable in its present form.

Q. (By Mr. Richardson): How much money did you make while you were there?

Mr. Soares: We object to that. It is incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and tending to prejudice the Defendants' [215] case and not proper rebuttal.

The Court: Do you mean from prostitution? Why don't you say so?

(Testimony of Sarah Lee Wright.)

Q. (By Mr. Richardson): How much money did you make there from prostitution?

Mr. Soares: We renew the objection on the same grounds.

The Court: Overruled.

Mr. Soares: Save an exception.

A. I made two thousand dollars for myself.

Q. (By Mr. Richardson): Two thousand for yourself? A. Yes.

Q. Now, Miss Wright, it has been testified to that you could leave the premises up there whenever you wished. Is that true?

Mr. Soares: We object to that, if the Court please. It has already been asked and answered, and it is not proper rebuttal, and it is a continuation of this attempt to prejudice these Defendants and deprive them of a fair trial.

The Court: Overruled.

Mr. Soares: Save an exception.

A. Like leaving in the daytime, they would always be with us, one of them anyhow. And like at nighttime, after we got through work, well, then they might drive us to the bakery, but they would always be with us.

Q. (By Mr. Richardson): Could you leave there by yourself? [216]

Mr. Soares: I object to that as leading and suggestive and not proper rebuttal and not tending to prove any issue in this case, and prejudicial.

The Court: Overruled.

Mr. Soares: Save an exception.

(Testimony of Sarah Lee Wright.)

A. Not at first I couldn't. Later on I went downtown a few times by myself.

Mr. Richardson: That's all.

Cross-Examination

By Mr. Soares:

Q. Did you want to leave?

A. I left, yes, I did.

Q. Did you want to leave at any time before you left?

A. Yes.

Q. Well, what stopped you from leaving?

A. Miner Lii.

Q. How did he stop you?

A. Well, everybody was scared of him. Why shouldn't I be, too?

Q. How? What did Miner Lii do to prevent your going?

A. Tell us all kinds of things.

Q. What?

A. That we'd go to jail and everything else like that.

Q. Well, you did leave finally?

A. After I got mad, yes. [217]

Q. You were living with Babe, weren't you?

A. Yes.

Q. And wasn't Babe your pimp?

A. No.

Q. And didn't you live with him in the Queen's Hotel as man and wife?

A. I was living with him. They were living together; they weren't married either.

Mr. Soares: I move that be stricken as not responsive to the question.

(Testimony of Sarah Lee Wright.)

The Court: Well, that's already in evidence.

Mr. Soares: It's a question whether they were married or not. They are Roman Catholics and in their eyes they were married.

Mr. Richardson: It's in the proof already.

Mr. Soares: I ask for a ruling of the Court.

The Court: Well, that being not in response to the question, it may be stricken and disregarded.

Q. (By Mr. Soares): You gave Babe money to come down here, didn't you? A. No.

Q. Are you sure about that?

A. I am positive.

Q. Is that as true as everything else you have testified to in this case? [218]

A. Everything I have testified to is true.

Q. You didn't wire him \$200?

A. I did send him \$200.

Q. What for? A. What for?

Q. Yes, what for.

A. Well, one reason is because maybe he needed it because he was having his car payments, and he helped me out when I was sick.

Q. Did you get any letters from him?

A. Yes.

Q. Did he ask for any money? A. No.

Q. Did he tell you he was sick?

A. I said he helped me when I was sick.

Q. Did he remind you of that? A. No.

Q. And you just suddenly sent him \$200?

A. I didn't suddenly. It was a very short time after I came over here.

(Testimony of Sarah Lee Wright.)

Q. When did you first decide you would send him \$200? A. Sir? I didn't hear it.

Q. When did you first decide you would send him \$200? A. I decided before I left home.

Q. And when did you send him the \$200? [219]

A. A couple of weeks after I came over here.

Q. While you lived at the Lii's? Did you have any expenses for food or rent or anything while you lived at the Lii's? A. No.

Q. You were making about \$60 a day?

A. Once in a while more than that.

Q. You never made less than \$60 a day?

A. Yes, I think I have.

Q. What's that? A. I think I have.

Q. But \$60 would be a fair average, is that right? A. No. I'd say more than sixty.

Q. So by the time you sent Babe this \$200 just because he had helped you when you were sick and not for him to come here, you had made over a thousand dollars, hadn't you?

A. No, because I had sent that to him in two weeks.

Q. What's that?

A. Let me see. I don't think I made that much, no.

Q. You wired the money, did you, to Babe?

A. Yes.

Q. Now, what was the need for sending it by wire?

A. I don't know. I always send things by wire.

Q. What other things do you send by wire?

(Testimony of Sarah Lee Wright.)

A. My sister telegrams. [220]

Mr. Richardson: That question is too indefinite, "What other things."

Mr. Soares: She says she sends things by wire, and that is just as reasonable as any of her other testimony. People don't send things by wire. I have a right to follow it up.

The Court: They send telegrams, don't they?

Mr. Soares: A telegram is not a thing. A telegram is a wire itself. A telegram is a piece of paper and doesn't go by wire.

The Court: Well, it is a message, isn't it?

Mr. Soares: It is a message. A message is not a thing.

The Court: But it is written. Proceed.

Mr. Soares: May I have the last?

(The reporter read the last question and answer.)

Q. (By Mr. Soares): Now, how long after you sent the money did Babe get here?

A. About two weeks.

Q. He waited two weeks before he got here?

A. I think it was something like that.

Q. Did you send any message with the wire?

A. No.

Q. What service did you use in sending the wire?

A. Where?

Q. Yes. [221]

A. Downtown is all I remember.

(Testimony of Sarah Lee Wright.)

Q. Well, was it Globe, Makay, RCA, Cable?

A. I don't remember because I didn't know. I just sent the wire.

Q. Who was with you when you sent the wire?

A. My girl friend, Mary Chang.

Q. Anybody else? A. No.

Q. From what office did you send the wire?

A. I don't know because I didn't know the town at the time, and all I know——

Q. But you know the town now?

A. Yes, but I haven't sent a wire since.

Q. Pardon?

A. I haven't sent a wire since.

Q. But tell us where this wireless office is from which you sent the \$200 to Babe because he had been good to you when you were sick?

A. I don't remember.

Q. You have no idea? A. No.

Q. As you think back you can't give us any idea where this wireless office is? A. No.

Mr. Richardson: She says she doesn't remember.

Mr. Soares: We are not bound by her answer. I insist that we have the right to cross-examine her.

The Court: Well, you are doing it.

Mr. Soares: That's what I think. I am waiting for a ruling of the Court.

The Court: There is no ruling.

Mr. Soares: Counsel objected to it. Read the last question and answer.

(The reporter read the last question and answer.)

(Testimony of Sarah Lee Wright.)

The Witness: I said, No.

Q. (By Mr. Soares): If you were to send a wire today, would you know where to go?

A. Well, there's one in Waikiki.

Q. You know a place in Waikiki?

A. I think so.

Q. Was that the place from which you sent this wire?

A. I wouldn't know if it was Waikiki, downtown or uptown because I don't remember at the time.

Q. You can't remember now whether the \$200 you wired to Babe was sent from an office in Waikiki or downtown?

A. No, because I didn't know Waikiki from downtown at that time.

Q. But you do know Waikiki from downtown now? A. Yes. [223]

Q. And you do know that there is a wireless office in Waikiki? A. Yes.

Q. Now, was it from that office that you sent this \$200?

A. I said I wouldn't know if it was or not.

Q. You can't tell us whether it was that one or not? It may have been from Waikiki or it may have been from downtown? A. It may have.

Q. And you don't remember?

A. I don't remember.

Q. Now, when I asked you what you used your money for when you were last on the stand, you

(Testimony of Sarah Lee Wright.)

spoke only of clothes and the rent. Why didn't you tell us about the \$200 you sent to Babe?

A. I didn't think of it at the time.

Q. What's that?

A. I didn't think of it at the time.

Q. Have you given Babe any other money besides the \$200? A. No, I didn't give.

Q. Pardon? A. No.

Q. Did you lend him any money besides the \$200? [224] A. No.

Q. Has he had any other money from you except this \$200? A. Yes.

Q. How much? A. Oh, just about \$10.

Q. What? A. Ten dollars.

Q. Did you give him that all at one time?

A. All at one time.

Q. And what was that for?

A. I don't know.

Q. Was he living with you at the time you gave him the \$10? A. No.

Q. Who paid for the Queen's Hotel charges?

A. Him.

Q. He paid? A. Yes.

Q. Out of your \$200?

A. I wouldn't know if he still had any of that \$200 or not.

Q. Did you notice whether he had any money?

A. Oh, he had money when he came over here.

Q. Plenty of money? A big roll? [225]

A. I wouldn't say a big roll.

Q. Well, enough so that you noticed it?

(Testimony of Sarah Lee Wright.)

A. All I know is that he had money. I didn't see it or notice it.

Q. Did he ever tell you why he came to Honolulu?

A. The thing I always thought, he wanted to try and play basketball.

Q. He told you he came here to play basketball?

A. No, he didn't he didn't say it, but he tried to play.

Q. But did he ever tell you why he came?

A. No.

Q. Did he ever tell you why he went to live with you when he has a wife of his own? A. No.

Q. You knew he had a wife? A. Yes.

Q. Did you ever return to the Miner Lii home after you left? I don't necessarily mean to live there. A. No, I never returned.

Q. Never came there?

A. Oh, I came there but never to live.

Q. That's what I say. You did come there?

A. Yes.

Q. How many times would you say after you left around [226] Thanksgiving?

A. I'd say about three times.

Q. Had you at that time been arrested?

A. No.

Q. You never were thereafter arrested and charged in Honolulu?

A. Not as I remember, I never was there.

Q. Do you remember starting off for the public prosecutor's office in company with Miner Lii?

(Testimony of Sarah Lee Wright.)

A. What was the question again?

Q. Do you remember going with Miner Lii to the City Hall?

A. I never went with Miner Lii nowhere.

Q. Did you ever go to the City Hall?

A. No.

Q. Didn't you tell Miner Lii that the Vice Squad was giving you a bad time? A. No.

Q. They weren't ever giving you a bad time?

A. No.

Q. As a matter of fact, they promised to leave you alone, didn't they? A. No.

Q. Did you ever ask Miner or Alice Lii for money? A. Certainly not. [227]

Q. How much money do you have now?

A. I refuse to answer that.

Mr. Richardson: I object to that. Just a minute.

The Court: Oh, that's——

Mr. Soares: It's cross-examination.

The Court: It isn't proper cross-examination.

Mr. Soares: We save an exception.

Q. Do you know how the police learned your story? A. About this?

Q. Yes. A. I told them.

Q. How did you come to tell them?

A. How did I come about it?

Q. Yes. A. Because I wanted to.

Q. Why? A. I didn't have any reason.

Q. You can't explain why you wanted to tell the police that Mr. and Mrs. Lii got your ticket?

A. Yes.

(Testimony of Sarah Lee Wright.)

Q. Why?

A. Well, one thing, if they brought me over here, the next time they are liable to bring somebody a little bit better.

Q. I can't hear. [228]

A. They bring me over here—if they bring me over, then they will bring somebody else.

Q. Oh, you were going to reform them? You were going to stop other girls from coming here?

A. No, not exactly.

Q. Well, why did you make that statement that if they brought you they might bring somebody else?

A. Well, for one thing I mean they brought me over here. I didn't know what I was expecting to get into. Maybe the next one wouldn't. From what I heard, there's a girl in the hospital on account of him.

Mr. Soares: We move that that be stricken, if the Court please, as not responsive to any question.

The Court: That's an answer to your question.

Mr. Richardson: Yes, if your Honor please.

Mr. Soares: Well, if the Court please, may I be heard? Is hearsay ever admissible? It is based on hearsay. It is a voluntary statement based upon hearsay.

The Court: She said that that is one thing that molded her mind.

Mr. Soares: But she said she heard it.

The Court: It doesn't make any difference how she got that.

(Testimony of Sarah Lee Wright.)

Mr. Soares: Very well, I move the answer be stricken. I have made that motion. Save an exception to the ruling of [229] the Court.

Q. Who is this girl?

A. I have heard her name but I don't know.

Q. What is her name?

A. I wouldn't know.

Q. In what hospital is she?

A. Oh, I don't even know that. I heard of it but I forgot that.

Q. From whom did you hear it?

A. Quite a few people.

Q. Name one of them.

A. I don't remember the names.

Q. When did you hear it?

A. When I first came over here.

Q. How long had you been here?

A. Oh, about five weeks, I imagine.

Q. Where were you when you heard it?

A. In Miner Lii's house.

Q. Who all were present?

A. Me, Mary Chang——

Q. What's that?

A. Me, Mary Chang, and Mr. and Mrs. Lii.

Q. And who told it to you?

A. Well, Miner and him was telling——

Q. What's that? [230]

A. Miner and his wife was talking to me about it because they thought she was going to get them into trouble.

(Testimony of Sarah Lee Wright.)

Q. Now, you do remember that it was Miner and his wife who told it to you?

A. A few other people did, too.

Q. When I asked you first, you couldn't remember who it was, is that right?

A. I mean the other people who told me.

Q. I didn't ask you about the other people.

A. I didn't remember that.

Q. You finally decided this was another chance to get at Miner Lii, is that right? A. No.

Q. All right. Now, whom did you first tell that the Liis had brought you over here?

A. I didn't tell anybody at first. Everybody was telling me.

Q. Who told you?

A. Well, people on the street.

Q. Well, who?

A. Just people that I noticed speak and talk to on the street. I don't know the names.

Q. You made a lot of acquaintances?

A. You mean I know them by name?

Q. All right, let's have the names. [231]

A. Different fellows, but I don't recall their names.

Q. They would simply walk up to you?

A. And then the Vice Squad.

Q. And then the Vice Squad? A. Yes.

Q. And what did the Vice Squad tell you about it? A. Sergeant Shaffer——

Mr. Richardson: I object to that, if your Honor please.

(Testimony of Sarah Lee Wright.)

Mr. Soares: It goes to her credibility.

Mr. Richardson: Not what the Vice Squad told her.

The Court: Overruled.

Q. (By Mr. Soares): What did the Vice Squad tell you?

A. Well, at the time they served the warrant on Miner, they come by my house and asked me if I was working in Miner's house at that time, and I said No. And they said, Well we know you was working there; we also know he brought you over here.

Mr. Soares: May I have that?

(The reporter read the last answer.)

Q. And what did you say to that?

A. I didn't have nothing to say.

Q. You didn't make any reply at all?

A. No.

Q. And that was at your house? [232]

A. Yes.

Q. And is that all the discussion you have had with members of the Vice Squad about your coming over here for the Liis?

A. I didn't quite——

Q. As I say, is that the only time a member of the Vice Squad discussed that subject with you?

A. No.

Q. When was the next time?

A. When I made the complaint out.

Q. When what?

(Testimony of Sarah Lee Wright.)

A. I made the other complaint out.

Q. Whose idea—what complaint are you referring to? A. About procuring.

Q. The one which they had the trial in the District Court and which they have appealed?

A. Yes.

Q. Is that what you mean? A. Yes.

Q. How come you made that complaint?

A. Because I wanted to.

Q. Why?

A. Why let him take two thousand dollars?

Q. What's that?

A. Why let him take two thousand dollars? [233]

Q. Well, that was many months after he had taken the two thousand, wasn't it?

A. Maybe then—then I began to wise up.

Q. What's that?

A. Then I began to wise up.

Q. Oh, you had never been up a proposition like this before, Sarah Lee? A. No.

Q. In the bars that you frequent in San Francisco you never had anything of this kind?

A. No.

Q. And you were an innocent girl when you came here? A. I won't say innocent.

Q. Well, I'm asking you, were you?

The Court: That question is very close to the borderline.

Mr. Soares: I will take the ruling of the Court. Nobody has objected to it.

(Testimony of Sarah Lee Wright.)

The Court: All right, what was the question?

(The reporter read the last question.)

The Court: Hasn't that been answered?

Mr. Soares: No, sir, the Court interrupted the answer.

The Court: I know, but she said she won't say "innocent."

Mr. Soares: Yes, but I want her to say it. That's why I asked the other question.

The Court: You may answer. [234]

A. That's just like him asking me, yes, if I was a virgin when I came here. There's no difference.

Q. Will you answer the question, please, and not argue? A. No, I wasn't innocent.

Q. You had been having an affair with this Babe before——

Mr. Richardson: I object to this.

Mr. Soares: I haven't finished the question.

Mr. Richardson: Well, I——

The Court: Sustained.

Mr. Soares: Save an exception to the ruling of the Court.

Q. Well, at any rate, you happened to swear out a complaint charging Mr. and Mrs. Lii with procuring so you could get back the other two thousand dollars, is that it?

A. No, I won't get it back.

Q. What's that? A. No.

Q. That's why you swore out the complaint?

A. No.

(Testimony of Sarah Lee Wright.)

Q. Well, you were sore?

A. Not so that I can get it back.

Q. Well, why did you swear out the complaint?

Mr. Richardson: I object to that. The reason she swore it out is immaterial.

Mr. Soares: Immaterial?

Mr. Richardson: It certainly is. [235]

Mr. Soares: She started this whole machinery going and then Counsel says we can't inquire into her motives.

Mr. Richardson: Maybe she swore it out because they had been procuring.

Mr. Soares: Well, maybe the witness ought to tip off the answer what he wants her to give. But the fact remains that we have a right to ask her what her motive was in initiating these proceedings.

Mr. Richardson: I object to it.

The Court: You may answer. What was the question?

(The reporter read the last question.)

The Witness: Shall I answer?

Mr. Soares: Yes, please answer.

A. Well, for one reason, why should I work for him?

Q. (By Mr. Soares): You weren't working for him then, were you, when you swore out that complaint?

A. No, but that's when I kept thinking about it.

Q. You had been arrested when you swore out that complaint, hadn't you? A. Yes.

(Testimony of Sarah Lee Wright.)

Q. And you thought maybe if you gave them something on Miner Lii they might let you go?

A. Oh, no.

Mr. Richardson: I object to it. He is asking this [236] witness whether she thought something.

The Court: It has been answered.

Q. (By Mr. Soares): And did they promise you anything if you would help them get Miner Lii this time? A. They didn't promise me nothing.

Q. And your only motive is that you didn't like the idea of his getting your two thousand dollars that you earned and you should have had?

A. That's right.

Q. Have you earned any money since you left Miner Lii's? A. No.

Mr. Richardson: I object to it. May we instruct the witness not to answer when the objection is made?

The Court: It has been answered.

Q. (By Mr. Soares): And you have lived on the money since then, on the money you earned at Miner Lii's? A. Yes.

Q. And that was, you say, two thousand dollars?

A. Yes.

Q. Did you lend Mary Chang any money?

A. No.

Q. Did you write to your sister and tell her you were making lots of money here? [237]

A. I don't remember.

Q. You may have? A. I don't remember.

Q. You say you may have?

(Testimony of Sarah Lee Wright.)

A. I won't say because I don't remember.

Q. It's true you were making lots of money here? A. At Miner Lii's house?

Q. Yes, you were making lots of it?

A. At his house?

Q. Yes. A. Yes.

Q. You never had made so much money before in your life?

A. That's right, because I never had worked before.

Q. You never worked at all?

A. That's right.

Q. Didn't you work in a bar?

A. I mean as prostitution.

Q. Well? A. Yes, I was working in a club.

Q. Didn't you ever work in Salinas?

A. No.

Q. Didn't you ever work in Stockton?

A. No.

Q. Did you ever stay there? [238] A. No.

Mr. Soares: That's all. No further questions.

Mr. Richardson: That's all.

(Witness excused.)

Mr. Richardson: If your Honor please, I have a witness in the hall. May I step out? It won't be but one minute and I will be right back. Call John Kramer.

JOHN B. KRAMER

a witness in rebuttal on behalf of the Plaintiff,
being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you state your full name, please?

A. My full name is John Burnette Kramer.

Q. Mr. Kramer, what position do you hold?

A. I am a deputy collector of Internal Revenue.

Q. Where is your office?

A. In the field division downstairs.

Q. That is here in this building downstairs,
is it? A. Yes, sir.

Q. Do you know Harold John Lewis?

A. I do.

Q. Yesterday morning between nine and ten, did
he come by to consult you about some tax return?

A. No, sir.

Mr. Richardson: That's all. [239]

Cross-Examination

By Mr. Soares:

Q. How do you know he didn't come by to con-
sult you about some tax return?

A. He came by and said—Harold is a personal
friend of mine of long standing—he came by and
he said through the window, from the outside of the
lanai, said, "Hi, John," and I said, "Hi, Harold."
I said, "Come on in." And he came in, sat down
to the rear of me, and I was busy with another tax

(Testimony of John B. Kramer.)

payer at that time. When I looked around he was gone.

Q. You didn't know that they went down to call him up because he was wanted in court, did you?

A. No, sir.

Q. And he didn't have the time to consult with you, did he? Did he or not have time?

A. He didn't have any occasion.

Q. Will you answer my question, please?

A. What was the question?

Q. He didn't have time to consult with you if he had wanted to, isn't that true? Why do you hesitate to answer, Mr. Kramer?

A. Well, I was busy with another tax payer.

Q. And so he didn't interrupt you, did he?

A. No, sir.

Q. And by the time you were through, he had gone? A. Yes, sir. [240]

Q. You work for the United States Government, don't you? A. I do.

Mr. Soares: No further questions.

Redirect Examination

By Mr. Richardson:

Q. He did not consult you, did he?

A. No, sir.

Mr. Soares: That is incompetent, irrelevant and immaterial, and I move that all the evidence be stricken.

The Court: Motion overruled.

(Testimony of William Samuel Holloway, Jr.)

Mr. Soares: Save an exception.

Mr. Richardson: That's all, Mr. Kramer.

(Witness excused.)

Mr. Richardson: Call Mr. William Holloway.

WILLIAM SAMUEL HOLLOWAY, JR.

a witness on rebuttal in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Mr. Holloway, will you state your full name, please?

A. My name is William Samuel Holloway, Jr.

Q. Mr. Holloway, what position do you hold?

A. I hold the position of safety engineer for the [241] Hawaii Aeronautics Commission.

Q. How long have you been with the Hawaii Aeronautics Commission?

A. Three and one-half years this July.

Q. Now, Mr. Holloway, is it part of your duties to be familiar with the landing fields on various islands in the Territory?

A. Yes, I am required as part of my duties to fly from every field in the Hawaiian Islands at least once a month.

Q. Mr. Holloway, is there an airport on the Island of Niihau?

A. There is no airport on the Island of Niihau.

(Testimony of William Samuel Holloway, Jr.)

Mr. Soares: We object to that, if the Court please.

Mr. Richardson: If your Honor please——

Mr. Soares: I ask that the answer be stricken until we can make the objection as incompetent, irrelevant and immaterial and not rebuttal of anything.

Mr. Richardson: It most certainly is rebuttal. The witness Lewis testified that he was flying between Kauai and Niihau.

Mr. Soares: All right, does there have to be an airfield? Did he say he landed in Niihau?

Mr. Richardson: I'm not through with him.

Mr. Soares: Well, we will take up what we have now, and it is immaterial whether there is an airfield in Niihau or not. [242] The witness said he was also spotting fish for fishermen between Kauai and Niihau.

Mr. Richardson: No, sir, he didn't. He said he was flying, that he was a pilot and was flying.

Mr. Soares: And he used the plane to spot fish for the fishermen between Kanai and Niihau. He never intimated that he ever landed in Niihau, and if Counsel had been here as long as your Honor and I have, he would know that the Robinsons wouldn't allow him to land even if there was an airfield.

Mr. Richardson: There was not a word yesterday about spotting fish.

The Court: Well, what is the proposition before the Court? You made an objection, did you?

(Testimony of William Samuel Holloway, Jr.)

Mr. Soares: Pardon?

The Court: You objected to it?

Mr. Soares: Yes, I object to it as incompetent, irrelevant and immaterial, not proper rebuttal, and seeking to discredit the witness on an immaterial matter.

The Court: Overruled.

Mr. Soares: Save an exception.

Mr. Richardson: Did the witness answer the question as to whether or not there was an airfield on Niihau?

A. My answer is that there was no airfield on the Island of Niihau.

Q. (By Mr. Richardson): Your knowledge has been that [243] there has been no airplane landed at Niihau since December 7, 1941, when a Jap plane crashed there?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial and not tending to prove any issue in this case, and not rebuttal. There has never been any claim anywhere in this case that any airplane ever landed in Niihau, not even on December 7th.

Mr. Richardson: This witness yesterday, if your Honor please, testified distinctly that he was flying an airplane. He said he was a licensed pilot, as I recall, and was flying an airplane between the Island of Niihau and Kauai. Certainly this is competent.

Mr. Soares: This isn't what he said at all.

The Witness: Shall I answer that question?

Mr. Soares: Just a minute, please.

(Testimony of William Samuel Holloway, Jr.)

The Court: The question, as I recall, was, had there been any air landings on the island?

Mr. Richardson: To his knowledge had there been a landing, yes.

Mr. Soares: We object to it as incompetent, irrelevant and immaterial.

The Court: I think that is immaterial.

Mr. Richardson: That's all. [244]

Cross-Examination

By Mr. Soares:

Q. Are you familiar with the language used by pilots?

A. Yes, sir, I am a licensed pilot and a licensed mechanic.

Q. One may fly between points without landing, one may not? A. Yes, sir.

Mr. Soares: That's all.

Redirect Examination

By Mr. Richardson:

Q. Was Lewis an instructor?

A. Our records indicate that Mr. Lewis holds a private pilot's certificate with the rating to fly single engine land aircraft. That is all of the ratings that he holds.

Mr. Richardson: That's all. Thank you, Mr. Holloway.

(Witness excused.)

Mr. Richardson: If your Honor please, I have

yet another witness that I haven't talked to. May I have a short recess? I am about to wind up.

The Court: All right, we will take a five-minute recess.

Mr. Richardson: I am just about to wind up, if the Court please. It won't be much.

(A short recess was taken at 9:55 a.m.)

The Court: It is just as well that I excuse the jury now until 1:30. [245]

Mr. Soares: If the Court please, these motions are to be made in open court and disposed of?

The Court: What motions?

Mr. Soares: The motion Counsel made for the continuance of this matter so that he could get his witnesses, because I want to follow it with a motion for a continuance so that I can get my witnesses.

Mr. Richardson: I will be glad to make a motion, if your Honor please. I'd like to request the Court to continue this case until this afternoon, to have a recess until this afternoon for the reason that I have three additional witnesses that I wish to put on that I have not had a chance to talk to.

Mr. Soares: Well, I, too, have a witness that I wish to put on, if the Court please, and up to last night I had every reason to believe she would be here. I received two wires, one on the 18th, merely saying that she would be here on time; and another wire on the 21st saying that she, saying that the exact time of her arrival, namely, that the exact time of her arrival would be Tuesday at six p.m. The witness did not arrive as expected and I com-

municated with certain people in San Francisco, and certain communications were made to me that would indicate why she did not arrive, and it was no fault of the Defendants. We ask, then, if there is to be a continuance, that this matter stand over one week so that we may issue a formal subpoena for Mary Chang to be a witness [246] on behalf of the Defendants. If your Honor will have a continuance, I ask that it be long enough to permit us to get our witness. We are in the same shape as Counsel—no subpoena issued until yesterday in their case, as I understand it. And since we are going to have a continuance and this is a very important witness—I suppose Counsel and the Court can readily see that, she being an associate of the parties involved here. And we cannot have a fair trial without her presence. So I move formally that the matter be continued for one week, or the latest to the 29th, the 28th.

The Court: Well, your witness, as I understand it, is not a rebuttal witness.

Mr. Soares: Yes, if your Honor please, this witness will rebut—it will be sur-rebuttal of much of the evidence that was given on the rebuttal; she will rebut all the evidence, practically all of the evidence which the witness denied with reference to certain—

The Court: When did you subpoena this witness?

Mr. Soares: A subpoena would have been unnecessary, if the Court please, and was unnecessary up to within the last few hours. As I say, we first had a wire in which it was indicated to us simply—and this was a wire of the 18th—that she was ar-

iving on time. We then had a wire of the 21st that she was arriving Tuesday at six p.m. We also have had a telephone communication that the ticket had been—that she had the [247] ticket. We checked with the airport to make sure she was on which plane, and we couldn't do it until the airplane is only a few hours outside of Honolulu. And we found that she was not on the plane, and we made inquiry by telephone and ascertained certain facts which would explain her not being here, and that the Defendant was not in any way at fault for her not being here.

In view of this testimony—at least we are ready to disclose who the witness is, which is more than the prosecution will do. And by that disclosure it is clearly indicated that she is an important witness on sur-rebuttal.

Mr. Richardson: If your Honor please, he could have subpoenaed her. He knew where she was. I was not in that position with reference to my witness. And I immediately got process out the minute we found our witnesses.

Mr. Soares: I didn't know, if the Court please, that after having given complete testimony that Sarah Lee Wright was going to testify as she now testified on rebuttal. And this witness is wanted now. And it is the first opportunity we have had to get her as a witness on sur-rebuttal to deny certain statements made by the witness for the Government on rebuttal.

The Court: Well, there is a great deal of difference between a continuance for the presence of witnesses during a part of one day and a couple of

hours or an hour and waiting [248] a week to bring someone from California here who, you say, is an important witness to you, was important in the main case. But it is a witness that was not subpoenaed. I can't tell what the affairs of the different members of the jury may be a week hence. It would be a serious interruption to the trial in any event and one that is fraught with all the dangers in that respect and matters of that sort. I would give you no more than an hour to produce your witnesses, but the Court is going to adjourn and recess at this time until 1:30. I informed you gentlemen yesterday or perhaps the day before, informed Counsel, that the Court will recess now.

Mr. Soares: May I have a formal ruling of the Court for my motion for a continuance in order to procure this other witness on rebuttal so that if there is an adverse ruling I may have an exception?

The Court: I will give you a ruling at 1:30.

Mr. Soares: Very well.

The Court: I called the jury in for the purpose of excusing them until 1:30, and you are now excused until 1:30 today.

(The Court recessed at 10:23 a.m.) [249]

Afternoon Session

The Court: The jury is in the box, all present. Now, what have you to say? What have you to offer now?

Mr. Richardson: I have three witnesses who will be very short, whom I wish to offer still in rebuttal, your Honor.

The Court: And how long will that take do you think?

Mr. Richardson: If your Honor please, I should estimate not over a half hour.

The Court: All right. Mr. Soares, the trial is too far advanced now to grant a continuance to bring someone from California, and your request for a week's time is refused.

Mr. Soares: May we have an exception?

The Court: Well, yes, of course. But you know the rules in the Federal Court. It isn't necessary to make an exception once you have objected.

Mr. Soares: Do I understand that the sole reason for denying the motion for continuance is because the trial is thus far advanced?

The Court: That is true.

Mr. Soares: Thank you.

Mr. Richardson: If your Honor please, of course the record shows that this witness is not under subpoena. I think that has all been gone into.

The Court: That has been gone into.

Mr. Richardson: Thank you. [250]

The Court: Proceed.

Mr. Richardson: Call Tony Rapoza.

ANTONE TONY RAPOZA

a rebuttal witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you state your full name, please, sir?

A. My name is Antone Tony Rapoza.

(Testimony of Antone Tony Rapoza.)

Q. Mr. Rapoza, what business are you in?

A. I am a sales representative for Schuman Carriage.

Q. How long have you been with Schuman Carriage?

A. I have been there since April 1, 1949.

Q. Mr. Rapoza, do you know Miner Lii and his wife Alice Lii? A. I do.

Q. Do you see them here in the courtroom?

A. I do.

Q. Can you point them out, please, sir?

A. They are right there. (Indicating.)

Mr. Richardson: Let the record show he has identified the Defendants.

Q. Now, Mr. Rapoza, in April of 1950 state whether or not you had dealings with these Defendants with reference to [251] an automobile?

Mr. Soares: We object to this as incompetent, irrelevant, and immaterial, if the Court please, and not proper rebuttal; it doesn't tend to prove or disprove any of the issues in this case.

Mr. Richardson: I will make an offer of proof, if your Honor please.

The Court: Well, as I remember it, Mr. Soares, there was testimony given as to the legal ownership of an automobile about that time, and there was testimony given by your witness, Alice Lii, with respect to it. And so far as I know and can see, it is proper to take the matter up on rebuttal.

Mr. Soares: But what does it rebut? She admitted the ownership. There isn't anything to rebut.

(Testimony of Antone Tony Rapoza.)

The Court: She also said that she had no real interest in the car equity; the ownership is in someone else.

Mr. Soares: Well, does Counsel expect to show by this witness that the car didn't belong to somebody else?

The Court: I don't know.

Mr. Richardson: I expect to show that the Liis bought this automobile.

Mr. Soares: Well, that is in evidence already. There is nothing to rebut there.

The Court: The motion is denied— [252] overruled.

Q. (By Mr. Richardson): Mr. Rapoza, in April of 1950 did you have dealings with these Defendants with reference to the purchase of a car?

A. I did.

Q. What kind of car was that?

A. A 1950 Cadillac, 4-door sedan.

Q. Did you handle this deal yourself?

A. I did, personally, yes.

Mr. Soares: If the Court please, rather than interrupt the examination, if that is possible in a Federal Court, may we be understood as objecting to all testimony with reference to either of these cars on the grounds that it doesn't tend to prove or disprove any issue in the case and is not rebuttal, nor will I be required to rise and make an objection each time a question is asked?

The Court: No, I think your preceding objection really covered that. But it may be understood that

(Testimony of Antone Tony Rapoza.)

you object to this, to any evidence that this witness may offer with relation to the car.

Mr. Soares: Very well.

The Court: And if you hear any special question which you wish to make a special objection to, then make it, because objections to admission or rejection of evidence in this Court are supposed to be based upon some reason advanced at the time the objection is made. [253]

Mr. Soares: Perhaps it will be safer for me to object each time.

Q. (By Mr. Richardson): Mr. Rapoza, did you deal with Miner Lii or Alice Lii or both of them?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

Mr. Soares: May I have a ruling?

The Court: Overruled.

Q. (By Mr. Richardson): Mr. Rapoza, I hand you a paper designated as Sales Memorandum and ask you if that shows, contains your signature? (Handing a sheet of paper to witness.)

A. That is my signature.

Q. Will you look at that paper, Mr. Rapoza, and state whether or not that shows the sale of this particular car to the Liis? A. It is.

Q. What financial arrangements were made about the purchase of this car?

Mr. Soares: I object to that as incompetent,

(Testimony of Antone Tony Rapoza.)

irrelevant and immaterial and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled. [254]

Q. (By Mr. Richardson): You may answer.

A. I took in a 1949 Lincoln Cosmopolitan; we took it in for twenty-two hundred dollars.

Q. That is, the value of the Lincoln was twenty-two hundred?

A. Twenty-two hundred dollars.

Q. What was the remainder, the purchase price?

A. \$1927.50.

Mr. Soares: Same objection.

Q. (By Mr. Richardson): How was that paid?

A. It was paid in cash. Actually in cashier's checks, which is equivalent to cash.

Mr. Soares: I didn't hear that.

(The reporter read the last answer.)

Q. (By Mr. Richardson): Did you handle that transaction yourself when this money was paid in?

A. I did.

Q. From whom did you receive the cash?

Mr. Soares: Objection to that as incompetent, irrelevant and immaterial, and not proper rebuttal.

The Court: Overruled.

Q. (By Mr. Richardson): From whom did you receive the cashier's checks?

A. I received it from Alice.

Q. By Alice you mean Alice Lii? [255]

A. Alice Lii, yes.

(Testimony of Antone Tony Rapoza.)

Q. Was Miner there at the time?

A. Yes, they both were there at the time.

Q. Now, from those records, Mr. Rapoza, how many times did the Defendants come to your place of business before they received the car?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal, and the records are the best evidence.

The Court: Overruled.

A. I appraised the car on 3/16/50; I delivered the automobile to them on 4/19/50.

Q. 3/16/50 to 4/19/50? That's about a month?

A. Correct. I cannot tell you how many times, exactly how many times they came in during the time his car was not ready for delivery.

Mr. Soares: May I have that?

(The reporter read the last answer.)

The Court: I was wondering when payment was made, before delivery, before these times?

The Witness: On the date of delivery.

Q. (By Mr. Richardson): That would be 4/19.

A. 4/19.

Q. That is the date you received the checks from the [256] Liis?

A. I received the checks—yes.

Mr. Soares: I object to that as a misstatement of the evidence.

The Court: That is true.

Mr. Soares: In addition to the other grounds.

(Testimony of Antone Tony Rapoza.)

The Court: That is true, unless you refer to these traveler's money orders as checks.

Mr. Soares: It wasn't traveler's orders; it was cashier's checks.

The Court: Cashier's checks.

Mr. Soares: The testimony specifically was that it came from Alice Lii and not from the Liis.

Mr. Richardson: I concede that.

The Court: Well, did you see the check?

The Witness: Did I see the check?

The Court: Did you examine it?

The Witness: Yes, sir, I did. I received the money and turned it over to the cashier.

The Court: Well, I suppose you would, but you yourself saw the check, the cashier's check?

The Witness: I went to the bank with Alice, and also received the check.

The Court: And went to the bank with her? What for? To cash the check? [257]

The Witness: Well, she wasn't familiar with the cashier's check and didn't know how to make out one, so I assisted in helping her have one made. We solved the problem of handling loose cash.

The Court: Well, how did she get a cashier's check?

The Witness: From the bank.

The Court: Well, what did she do to get it?

The Witness: All you have to do is present your bank book and say you want to subtract \$1927.

The Court: Is that what she did?

The Witness: That's right, sir.

(Testimony of Antone Tony Rapoza.)

The Court: Well, can't you tell it?

The Witness: That's just what I am saying, sir.

The Court: What bank?

The Witness: Bank of Hawaii.

The Court: All right.

Q. (By Mr. Richardson): That was on the date the car was delivered? A. That is correct.

Mr. Richardson: If your Honor please, I wish to offer the sales memorandum in evidence. (Handing sheet of paper to Mr. Soares.) It has been identified by this witness.

Mr. Soares: We object to it as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case, and not proper rebuttal. [258]

The Court: Well, I will have to see it before I can pass on that. (Paper handed to the Court.) It may be received in evidence.

The Clerk: Plaintiff's Exhibit "C."

(The document referred to was received in evidence as Plaintiff's Exhibit "C.")

Mr. Richardson: That's all.

Mr. Soares: No questions. I move that the testimony of this witness be stricken as being wholly incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and not rebuttal.

The Court: Overruled.

(Witness excused.)

Mr. Richardson: Call Mr. Ogata.

HARLOW T. OGATA

a rebuttal witness on behalf of the Plaintiff, being
duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you state your full name, please, sir?

A. Harlow T. Ogata.

Q. For whom do you work, Mr. Ogata?

A. Beg pardon?

Q. For whom do you work?

A. Universal Motor Company. [259]

Q. And how long have you been with them?

A. Over two years. It's almost three years now.

Q. Do you know Miner Lii and his wife Alice
Lii? A. Yes.

Q. Do you see them in the courtroom?

A. Yes.

Q. Can you identify them?

A. In the black shirt and the one next to him.

Q. Now, Mr. Ogata, in April of 1949, did you
have any dealings with the Liis with reference to
the purchase of a 1949 Lincoln Cosmopolitan?

A. Yes, sir.

Mr. Soares: We object to the question as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

(Testimony of Harlow T. Ogata.)

Q. (By Mr. Richardson): Did you handle that deal yourself, Mr. Ogata?

A. That's right, sir.

Q. Now, whom did you deal with, Mr. Lii or Mrs. Lii, or both?

A. Both.

Mr. Soares: Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and not proper rebuttal. [260]

The Court: Overruled.

Q. (By Mr. Richardson): Mr. Ogata, I hand you a paper marked "Car Invoice" and ask you if you can identify that? (Handing a sheet of paper to the witness.)

A. Yes.

Mr. Soares: I object to it as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

Q. (By Mr. Richardson): I further hand you, Mr. Ogata, a customer's order number and ask you if you can identify that? (Handing a sheet of paper to the witness.)

A. Yes, that's right.

Mr. Soares: I object to it as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

Q. (By Mr. Richardson): Now, did those papers cover the transaction that you had with the Liis?

A. That's right, sir.

(Testimony of Harlow T. Ogata.)

Mr. Soares: I object to it as being incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal, and it is leading and suggestive and the papers are the best evidence.

The Court: Overruled. [261]

Mr. Soares: Exception.

Q. (By Mr. Richardson): From those papers and from your knowledge of the transaction, Mr. Ogata, just tell the Court just what happened?

Mr. Soares: We object to it as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and not proper rebuttal, and calling for hearsay.

The Court: Overruled.

Q. (By Mr. Richardson): That is, the details of the sale.

Mr. Soares: Same objection.

A. Well, they came to see me like any other customer.

Q. (By Mr. Richardson): Speak out loud so the jury can hear you.

A. They came to see me like any other customer comes in the place and they look at the car first and then we go——

Mr. Soares: We object to his telling what other customers do, if the Court please, in addition to the objection to the testimony generally as it relates to these defendants.

A. Well, Mr. Miner Lii told me to give him all the figures on a Lincoln, what models we had and

(Testimony of Harlow T. Ogata.)

everything. I showed him everything. And I appraised his Buick, the '47 Buick that he had at that time. We gave him a certain figure for that which was agreeable to him, and we made the [262] transaction.

Q. (By Mr. Richardson): You spoke of a '47 Buick. What part does that play in that transaction?

A. The '47 Buick was turned in as a trade-in.

Q. He traded that in on the Lincoln?

A. That's right.

Mr. Soares: Object to that as leading and suggestive and not proper rebuttal.

The Court: Overruled.

Q. (By Mr. Richardson): Now, what amounts of money were involved? How was the trade handled?

Mr. Soares: Object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

The Witness: Shall I give you the figures?

Mr. Richardson: Yes, sir.

A. The total amount for that Lincoln Cosmopolitant sedan, \$4,430. We gave him \$1,773 as a trade-in for his '47 Buick.

Q. What balance did that leave?

A. Left a balance of \$2,627.30.

Q. How was that paid, Mr. Ogata?

Mr. Soares: Object to that as incompetent, irrele-

(Testimony of Harlow T. Ogata.)

vant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal. [263]

The Court: Overruled.

A. The balance was paid in six payments. Shall I give you all the figures?

Q. Yes, if you will.

A. On April 29, 1949, he paid \$400 in cash; May 2, 1949, \$208.65; May 3, 1949, \$50.

Mr. Soares: What was that last date?

The Witness: May 3, 1949.

Mr. Soares: How much?

The Witness: Fifty dollars.

A. (Continuing): May 4, 1949, \$50; May 10, 1949, \$100; May 11, 1949, \$100. That made the balance of \$2,627.30 paid up in cash.

Q. (By Mr. Richardson): Mr. Ogata, can you identify these papers that I have handed you as papers used in the regular course of your business in which you made this transaction with the Liis?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: I didn't get that question.

(The reporter read the last question.)

Mr. Richardson: If he could identify these papers as the papers used in the regular course of business in his company which covered this particular transaction with the Liis. [264]

The Court: Overruled.

(Testimony of Harlow T. Ogata.)

A. Yes, sir.

Q. Your answer is Yes? A. Yes.

Mr. Richardson: Thank you. If your Honor please, I wish to offer in evidence the paper shown as "Car Invoice" and one as "Customer's Order Number." (Handing documents to Mr. Soares.)

Mr. Soares: I'd like to cross-examine the witness as to his testimony that this so-called customer's order number was a record kept in the regular course of business.

The Court: Very well. I missed the amount of cash that was paid in at the time of the trade-in.

Q. (By Mr. Richardson): Was any cash paid in at the time of the trade-in?

A. I can't answer that because I don't know if he paid any cash besides his car that day. I am not so sure. There is a certain required amount for down payment, and his car that we gave him as a trade-in.

The Court: Well, down payment, that's what I am talking about, at the time that the Buick was turned in. Was there any down payment made at that time?

Mr. Richardson: Other than the car. Is that what your Honor had in mind?

The Court: Yes. [265]

The Witness: That's a thing I am not so sure. I will have to check with the office.

The Court: Well, how are you sure, then, about these other figures, April 25th, \$400, and so on?

The Witness: That's right, sir.

(Testimony of Harlow T. Ogata.)

The Court: How are you sure of that, then?

The Witness: That's the one that was given to me by the office.

The Court: Well, which one are you speaking about, the green one or the white one?

The Witness: Both of them was given to me by the office.

The Court: If you know these figures begin on April 29th, on the same sheet as cash payment received on April 21st of \$1718.65—you don't know anything about that, do you? Did you say you did or didn't?

The Witness: This is the amount of the trade-in we allowed him on the car.

Mr. Richardson: Was that the amount of the Buick that he traded in, that seventeen hundred dollars?

The Witness: That's right, sir.

The Court: Well, I understand there was a Buick that was traded in that had a certain value, and was there any substantial cash payment made at that time?

The Witness: Maybe he made. That's the thing I'm not sure. [266]

The Court: Don't maybe.

The Witness: I'm not sure.

The Court: How do you know some of the figures on these statements without knowing all of them? Take that statement and read it. You just testified from it.

Mr. Richardson: Can you tell from those records

(Testimony of Harlow T. Ogata.)

if any cash payment was made in addition to the Buick at the time of the delivery of the car? Would that be your Honor's question?

Mr. Soares: Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and calling for hearsay. The records are the best evidence.

The Court: Sustained.

Q. (By Mr. Richardson): Do you know if a cash payment was made at the time of the delivery of the car other than the trade-in on the Buick?

Mr. Soares: I object to the question as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled. He may answer if he knows. That is the question.

A. To tell the truth, I am not quite sure.

Mr. Richardson: If your Honor please, I make no issue of admitting these papers in evidence.

Mr. Soares: I'd like to have them marked for identification, [267] however.

The Court: The papers may be marked for identification.

The Clerk: Defendants' Exhibit "A" for identification.

The Court: At the request of the Defendant.

(The papers referred to were marked "Defendants' Exhibit A for Identification"—A-1 & A-2 for Identification.)

(Testimony of Harlow T. Ogata.)

Cross-Examination

By Mr. Soares:

Q. Now, what is your particular position, Mr. Ogata? A. Beg your pardon, sir?

Q. What is your particular position with the Universal Motors?

The Court: Counsel, you need not waste time on the question of regular course of business. That's been disposed of.

Mr. Soares: Yes, but he has testified with these papers before, if the Court please, as to certain specific payments. I want to show——

The Court: His testimony finally shows that he has no personal knowledge of these payments, other than the trade-in, and that there was a balance due of \$2627.

Mr. Soares: Then I move that the testimony purporting to state what payments were made and the dates of payments be stricken.

The Court: That is stricken.

Mr. Soares: And I further move that all the evidence [268] of the witness be stricken as being wholly incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in the case, and not proper rebuttal.

The Court: That is overruled.

Mr. Richardson: I have no further questions.

Mr. Soares: No further questions.

The Court: All right, you are excused.

(Witness excused.)

Mr. Richardson: Call Lorraine Staunton.

LORRAINE MARJORIE STAUNTON

a rebuttal witness on behalf of the Plaintiff, being
duly sworn, testified as follows:

Direct Examination

By Mr. Richardson:

Q. Will you give your full name, please?

A. Lorraine Marjorie Staunton.

Q. Where do you live, Miss Staunton?

A. Well, at the present at Nanakuli.

Q. How old are you, Miss Staunton?

A. Twenty years old.

Q. Do you know Miner Lii and his wife Alice
Lii? A. Yes, I do.

Q. Do you see them in the courtroom?

A. Yes, I do. [269]

Q. Can you point them out, please?

A. They are both sitting down there.

Mr. Richardson: Let the record show that she
has identified the Defendants.

Q. Now, how long have you known Miner Lii?

A. Well, I have known Miner since I was at the
age of eleven, and I didn't know him too well to talk
to, but I met him again in 1948 down on Bethel
Street.

Q. Is that the first time you have seen him since
you were a young girl? A. Yes.

Q. When was that that you met him?

A. 1948.

Q. And where did you meet?

(Testimony of Lorraine Marjorie Staunton.)

A. On Bethel Street.

Q. And how did you happen to meet him? Just what took place?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal. Nothing was said of 1948 in connection with Miner Lii or anybody else in this case, or nothing upon which an answer to that question could possibly rebut.

The Court: I take it that that is merely an introductory question laying the ground for some other question. [270]

Mr. Richardson: That is entirely true, if your Honor please. I want to show the background.

The Court: Well, go ahead.

Q. In 1948? A. Yes.

Q. Now, just state what happened when you met him?

Mr. Soares: We object to it as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the allegations in this case, not proper rebuttal and too remote for any place——

The Court: Overruled.

Mr. Richardson (To the witness): Go ahead.

A. Well, in 1948 I met him down at Bethel Street and he asked me to go for a ride with him.

Q. Speak loud, Miss Staunton, so we can all hear.

A. Well, he asked me to go for a ride with him, which I did. We ended up at Koko Head, and he

(Testimony of Lorraine Marjorie Staunton.)

was talking to me about the subject of prostitution.

Q. Well, what did he say about it?

A. Well, he asked me if I wanted to go into something like that.

Q. Did he say where? A. Yes.

Q. Where? A. At his home. [271]

Q. What did you tell him?

A. Well, I told him that I would go up with him.

Q. Did you go? A. Yes, I did.

Q. Who was there when you got there?

A. His wife.

Q. And how long did you stay?

A. Well, I stayed there for dinner and after that I left.

Q. Was anything else said while you were there about the subject of prostitution? A. Yes.

Q. What was said about it?

Mr. Soares: We object to all this as incompetent, irrelevant and immaterial and not tending to prove or disprove any issue in this case.

The Court: Overruled.

Mr. Richardson: Go ahead.

A. Well, his wife asked me about it.

Q. Well, now, when you say "asking about it," what was said?

A. Well, she asked me about going into prostitution.

Q. Where?

A. At her home, which I refused then.

Q. Now, when did you next see Miner Lii? [272]

(Testimony of Lorraine Marjorie Staunton.)

A. I saw Miner Lii in April of 1950.

Q. And how did you happen to see him?

A. Well, I was on parole from the girls' training school and I got out, see, and between that time I have been contacting his brother by telephone and his wife, and I told them, I told his brother that I would come up.

Mr. Soares: I object to the conversation.

Mr. Richardson: She is telling what she told.

Mr. Soares: It is still immaterial and not proper rebuttal of anything that came out in the case in chief.

The Court: Whatever you wish to draw from the witness, can't you proceed a little more directly?

Mr. Richardson: I beg your Honor's pardon?

The Court: I say, whatever you wish to draw from the witness, can't you proceed a little more directly?

Mr. Richardson: Well, I asked her, if your Honor please, when was the next time she saw him and she is explaining when that was and how it came about.

The Court: All right.

Mr. Richardson: Go ahead.

A. (Continuing): Well, then, I ran away from the place that I was working at. It was up in Keanu Street. Then I went up to my cousin's place up at Alewa Heights. And that evening I went down to Miner Lii's house.

Q. (By Mr. Richardson): Well, now had you

(Testimony of Lorraine Marjorie Staunton.)

been in touch [273] with him before you went?

A. Yes.

Mr. Soares: We object to that as leading and suggestive and incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: That is leading but she answered it.

Mr. Soares: Well, she answered it before I had a chance to make the objection. I move the answer be stricken so the objection might be considered.

Mr. Richardson: I will rephrase the question.

Mr. Soares: Is the answer stricken, then?

The Court: Yes.

Q. (By Mr. Richardson): State whether or not you had been in contact with Miner Lii before you went there? A. Yes.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal, and it is leading and suggestive.

The Court: Overruled.

Mr. Richardson: Go ahead.

A. Well, after that I went up there anyhow. But in the meantime I got in contact with them. I said that I was coming up. [274]

Q. (By Mr. Richardson): How did you get in contact with them? A. By telephone.

Q. All right. Just tell what happened?

A. Well, I went up there and then they had another girl there.

Q. Who did you see when you got there?

(Testimony of Lorraine Marjorie Staunton.)

A. It was Miner and his wife.

Q. You say there was another girl there?

A. Yes.

Q. Did you talk to Miner and his wife?

A. Yes, I did.

Q. What about? A. Well, I told them——

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

Q. (By Mr. Richardson): What about?

A. Well, I told them that I had ran away. So they told me that I could stay there.

Q. That you could stay there?

A. Yes. And then again they brought up the subject of prostitution, since I was down and out that they would advise me to do that. [275]

Q. What did you tell them?

A. I said, all right. But there are a lot of promises made.

Q. What sort of promises?

Mr. Soares: I object to all this as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Well, you had better find out who the promises were made by.

Q. (By Mr. Richardson): Who made you any promises, Miss Staunton? A. Miner Lii.

The Court: Overruled.

(Testimony of Lorraine Marjorie Staunton.)

Q. Did Alice make you any?

A. Well, I don't remember that part.

Q. Well, what was the nature of the promises?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

A. Well, they said that I could own a car or other things.

Q. (By Mr. Richardson): Did they ask you to go into prostitution there?

A. Yes, they did. [276]

Mr. Soares: I object to that as leading and suggestive, and it is incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

Mr. Richardson: You may answer that.

A. Yes, they did.

Q. Well, did you do so? A. Yes, I did.

Q. When did you start?

A. On the same day that I got there.

Mr Soares: I object on the same grounds heretofore made

The Court: Your objection is noted. Overruled.

Q. (By Mr. Richardson): When did you start?

A. On the same day that I arrived there.

Q. Did you say that was in April, 1950?

A. Yes.

(Testimony of Lorraine Marjorie Staunton.)

Q. Now, Miss Staunton, how long did you stay there that day?

A. I just stayed there and I went home that evening.

Q. What time that evening?

A. I don't remember.

Q. Who took you home?

A. Miner Lii. [277]

Q. During the course of that evening there how many customers did you have?

Mr. Soares: I object to this as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

Mr. Richardson: You may answer.

A. Well, he took me home that evening. There were about—I don't exactly remember. It's about two or three.

Q. What was the financial arrangement that you made with the Liis, if any?

Mr. Soares: We object to this as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, not proper rebuttal, and it is leading and suggestive.

The Court: Overruled.

A. Well, he had told me that he had charged men ten dollars, but when I asked the men there their answer was twelve dollars.

Mr. Soares: We object to this as being hearsay.

Q. (By Mr. Richardson): Don't tell what some-

(Testimony of Lorraine Marjorie Staunton.)

one else told you. What did Miner tell you? You can testify to that.

Mr. Soares: Same objection.

The Witness: Will you repeat that again?

Q. (By Mr. Richardson): What was the financial arrangement [278] that you had with Mr. and Mrs. Lii? A. It was ten dollars.

Q. And who collected the money?

Mr. Soares: Objected to as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

A. Mr. and Mrs. Lii.

Q. (By Mr. Richardson): Did you ever collect any money from the customers there?

A. Yes, I did.

Mr. Soares: We'd like an opportunity to object, if the Court please.

The Court: Overruled.

Mr. Soares: Same objection.

Q. (By Mr. Richardson): How much of the amount charged were you to get?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal, and it is leading and suggestive, and it is assuming something not in evidence.

The Court: Overruled.

A. About four dollars.

Q. In other words, you were to receive——

(Testimony of Lorraine Marjorie Staunton.)

A. Three or four. [279]

Q. Beg your pardon? A. Three to four.

Q. All right, then. You stated Miner Lii took you home that night? A. Yes.

Q. Did you receive any money from Miner Lii on the way home? A. Yes, I did.

Q. How much was that? A. Five dollars.

Q. Now, when did you next see Miner Lii?

Mr. Soares: I object——

A. The second night.

Mr. Soares: ——to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal. It is assuming something not in evidence.

The Court: Overruled.

A. On the second night.

Q. (By Mr. Richardson): Is that the following night, now, from the time that you have been just speaking of? A. Yes.

Q. What time did you go there that night?

A. Well, I went there that night——

Mr. Soares: I object to that as incompetent, irrelevant [280] and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

A. I went there the next night at five o'clock.

Q. How long did you stay there that time?

A. The whole night.

Mr. Soares: Objected to as incompetent, irrelevant and immaterial, not tending to prove or dis-

(Testimony of Lorraine Marjorie Staunton.)

prove any issue in this case, and not proper rebuttal.

The Court: Overruled.

Q. (By Mr. Richardson): What was the answer?

A. I stayed there the whole night. That is, on the second night.

Q. Was Miner Lii and his wife both there that night? A. Yes.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial and not rebuttal.

The Court: Overruled.

Q. How many customers did you have that night?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not rebuttal.

The Court: Overruled.

A. Two.

Q. And did the customers pay you the [281] money?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not rebuttal; it is leading and suggestive.

Mr. Richardson: I am not through with the question.

Mr. Soares: And showing something not in evidence. I have to be quick because the witness answers——

The Court: Overruled.

A. There were two.

(Testimony of Lorraine Marjorie Staunton.)

Q. (By Mr. Richardson): Well, my question is, was the money paid directly to you or was it paid to someone else there?

A. To someone else.

Mr. Soares: Same objection.

Q. (By Mr. Richardson): Who?

A. Miner Lii.

Mr. Soares: Same objection.

The Court: Overruled.

Q. And when did you receive your share of that money?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, not proper rebuttal, and it is leading and suggestive and assuming something not in evidence.

The Court: Overruled.

Q. The question was, when did you receive it?

A. The latter part of the evening.

Q. Beg your pardon? [282]

A. It was about 12:30, 1:00 o'clock.

Q. And who gave you that money?

A. Miner Lii.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal.

Q. (By Mr. Richardson): How long did you stay there? A. Three days.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or

(Testimony of Lorraine Marjorie Staunton.)

disprove any issue in this case, and not proper rebuttal.

The Court: Overruled.

Q. How long did you stay there?

A. Three days.

Q. And was there another girl there while you were there? A. Yes, there was.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal and leading and suggestive.

The Court: Overruled.

Q. What was her name?

A. She went under the name as Barbara Jean Roger, but her real name is Barbara Andrade.

Q. You stayed there three days?

A. Yes. [283]

Q. I want to ask you about the arrangements up there. Did you work right in the house?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case, and not proper rebuttal and leading and suggestive.

The Court: I wish you would make make your questions a little more specific. If you are inquiring whether she did housework or whether she did prostitution, why, that is very important, a very important part of the question.

Mr. Richardson: I should have used the word "work" in that sense.

Q. Did you work as a prostitute in the house?

(Testimony of Lorraine Marjorie Staunton.)

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, not proper rebuttal and leading and suggestive.

The Court: Overruled.

Q. Will you tell the Court and jury what the arrangement was there about where you worked as a prostitute?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

Q. Will you tell about the arrangements up there about where you did work as a prostitute? [284]

Mr. Soares: Same objection.

A. Well, it was outside of the house.

Q. (By Mr. Richardson): Do they have a garage outside of the house? A. They have.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, not proper rebuttal, and already asked and answered, and it is leading and suggestive.

The Court: Overruled.

A. Yes, they have.

Q. (By Mr. Richardson): Was that where you were working as a prostitute? A. Yes.

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, not tending to prove or

(Testimony of Lorraine Marjorie Staunton.)

disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

Q. (By Mr. Richardson): Now, Miss Staunton, when did you leave up there?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal.

A. I left one morning, the fourth morning. It was on the third morning. I left there with Barbara Andrade. We [285] both left.

Q. (By Mr. Richardson): Both left at the same time? A. Yes, we did.

Q. Did the Liis know that you were leaving?

A. No.

Mr. Soares: I object to the answer as not being competent, as irrelevant and immaterial, not tending to prove or disprove any issue in this case, and not proper rebuttal, and calling for a conclusion of the witness.

The Court: Overruled.

Q. (By Mr. Richardson): Miss Staunton, were there any other girls working as prostitutes there in the house at the time you were there?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal, and it is leading and suggestive and asking for the conclusion of the witness.

(Testimony of Lorraine Marjorie Staunton.)

The Court: If she knows of her own knowledge, she may answer.

Mr. Richardson: Do you know, Miss Staunton?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

A. Yes, but I have never seen them. [286]

Mr. Soares: I move that the answer be stricken. She couldn't possibly have known for she didn't see them.

The Court: Well, the answer may be stricken.

Q. (By Mr. Richardson): How much money did you personally make up there as a prostitute during the time that you were there?

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, already asked and answered, and not proper rebuttal.

The Court: The question is not sufficiently clear.

Mr. Richardson: If your Honor please, how much she made during the time she was there working as a prostitute?

The Court: I can't tell whether the witness will understand from that. I don't understand how much she made—how much did she get for her own money or how much was paid for her services?

Mr. Richardson: Well, let me put it this way:

Q. I will ask you, how much did you receive while you were there?

Mr. Soares: I object to that as incompetent, ir-

(Testimony of Lorraine Marjorie Staunton.)

relevant and immaterial, not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: Overruled.

A. I don't remember exactly because some of the money was taken out by Miner Lii to pay for house rent. [287]

Q. House rent? A. Yes.

Q. Now, Miss Staunton, had you ever worked as a prostitute before the time you went to Miner Lii's house? A. No.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues in this case——

The Court: Your answer was No.

The Witness: No.

The Court: Overruled.

Q. (By Mr. Richardson): Miss Staunton, you stated, I think, that you were a parolee from the girls' training school? A. Yes, I was.

Mr. Soares: I object to that as incompetent, irrelevant and immaterial——

The Court: I didn't get that.

Mr. Soares: ——and not tending to prove or disprove any of the issues in this case, and not proper rebuttal.

The Court: I didn't get that.

Mr. Richardson: My question was—she stated previously that she was a parolee from the girls' training school.

The Court: Well, what was the question?

(Testimony of Lorraine Marjorie Staunton.)

Mr. Richardson: I wanted to ask her why she was confined to the girls' training school. [288]

Mr. Soares: I object to that as incompetent, irrelevant and immaterial——

The Court: Sustained.

Mr. Richardson: That's all.

Cross-Examination

By Mr. Soares:

Q. You said you never worked as a prostitute before you went to Miner Lii's? A. No.

Q. You had had rather promiscuous sexual intercourse with a large number of boys before that time, had you not?

Mr. Richardson: I object to that, if your Honor please. It is going into something that is not material here. She stated she is not a prostitute. That is the question. It is not what her private life had been.

The Court: Overruled, the objection is overruled.

Mr. Soares: Will you answer the question, please? A. No.

Mr. Soares: What's that?

The Court: Do you know what "promiscuous" means?

The Witness: I don't exactly remember.

Q. (By Mr. Soares): Well, you had sexual intercourse with at least several boys before you were sent to the industrial school, hadn't you?

A. Yes. [289]

Q. What's that? A. Yes.

(Testimony of Lorraine Marjorie Staunton.)

Q. About how many?

A. I don't remember.

Q. Well, can you give us some idea?

The Court: Well, if she doesn't remember that's enough, that's sufficient. She said that she had several. She answered that question.

Mr. Soares: I'd like to ask her about how much.

The Court: Well, you asked her if she didn't have several and she said Yes. That's enough. I don't care to have that followed any more.

Mr. Soares: The Court precludes me from cross-examining her further on the number of sex relations she had?

The Court: Yes, it isn't material. She admits several.

Mr. Soares: I will abide by the Court's ruling.

Q. You have a brother on the police force in the City and County of Honolulu, do you not?

A. Yes, I have.

Mr. Soares: That's all. No further questions.

Mr. Richardson: That's all.

(Witness excused.)

The Court: Are those all your witnesses?

Mr. Richardson: Yes, that's the Government's case.

Mr. Soares: I move that the evidence of this witness be [290] stricken, if the Court please, as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case.

The Court: Overruled.

Mr. Soares: And not proper rebuttal.

The Court: Overruled.

Mr. Soares: May I have just a moment, if the Court please?

The Court: Yes.

Mr. Soares: Take the stand, Mrs. Lii.

ALICE LII

a witness for the Defendants on surrebuttal, having previously been sworn, resumed and testified as follows:

Direct Examination

By Mr. Soares:

Q. Your name is Alice Lii? A. Yes.

Q. You are one of the Defendants in this case?

A. Yes.

Q. You were previously on the witness stand?

A. Yes.

Q. You heard the testimony, I take it, of the witness who just left the stand? A. I did.

Q. I will ask you whether or not it is true as she has [291] testified that you discussed with her, or your husband discussed with her in your presence, arrangements whereby she was to enter into the profession of prostitution in your home?

A. I never did.

Q. Did you hear her testimony?

A. I did.

Q. Is that true or false?

A. It is not true.

Q. So far as you know, did she ever follow the

(Testimony of Alice Lii.)

profession of prostitution in your home or anywhere else? A. What was that again?

Q. I say, as far as you know, did she ever follow the profession of a prostitute in your home or anywhere else? A. Not that I know of.

Q. Did you have any arrangement with her of any kind? A. No.

Q. Did you ever receive money from her, any money from her, the proceeds of her prostitution?

A. I did not.

Q. Or did you receive the money from anyone else, the proceeds or part of the proceeds of prostitution? A. No.

Q. Did she ever stay at your home? A. No.

Mr. Soares: No further questions. [292]

Cross-Examination

By Mr. Richardson:

Q. How long have you known her, Mrs. Lii?

A. Well, I was introduced to her once.

Q. When was that?

A. I don't remember the date.

Q. How long ago was it?

A. I can't remember the date.

Q. Well, was it one month, six months, two years, just your best idea?

Mr. Soares: I think I should object and come within the ruling of the Court, the same as when I tried to pursue questions after the witness said she

(Testimony of Alice Lii.)

didn't remember in the last instance; it is on the same grounds as the Court announced a ruling on an objection, namely, that it is sufficiently covered, and the statement was made that she didn't remember how many acts of intercourse she had had. So too, here we object.

The Court: This question is, How long did you know her? Isn't that it?

Mr. Soares: She said she didn't remember. So the question, applying the same rule as was applied to the previous witness, is sufficiently covered, it covers that answer.

The Court: Upon reflection, do you now recall about how long? [293]

The Witness: I still can't remember.

The Court: That's the end.

Q. (By Mr. Richardson): Mrs. Lii, you stated here the other day that you remembered the name Lorraine Staunton, did you not?

A. I said that name sounded familiar to me.

Q. But you didn't remember any girl like that? Is that what you stated?

Mr. Soares: We object to that as incompetent, irrelevant and immaterial. It is not proper cross-examination. We didn't bring out anything about her prior testimony, if the Court please. It has already been asked and answered.

Mr. Richardson: She now states that she was introduced to her.

Mr. Soares: All right. How is that material? How is that material to the issues in this case?

(Testimony of Alice Lii.)

The Court: Sustained.

Q. (By Mr. Richardson): Mrs. Lii, you and Miner visited Lorraine when she was in Kaneohe Hospital, didn't you?

Mr. Soares: We object to that. It is incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and not proper cross-examination.

The Court: Overruled.

A. I don't remember that.

Q. You don't remember whether you did or didn't visit [294] her in the hospital?

A. I don't remember. I have been to Kaneohe Hospital to visit people but I don't remember visiting her, though.

Q. You don't remember whether you did or not?

A. No, I can't remember that.

Q. Well, if you had visited there, Mrs. Lii, you would have remembered it?

Mr. Soares: We object to that as argumentative and not proper cross-examination.

The Court: Sustained.

Mr. Richardson: That's all.

Mr. Soares: Step down. That's all.

(Witness excused.)

Mr. Soares: Except for the witness Mary Chang, if the Court please, we have no other evidence on sur-rebuttal, and we await the Court's ruling on our motion heretofore made that this matter be continued to a future date. And I suggest the 28th of May in order that we may subpoena—

The Court: The Court already ruled on that.

Mr. Soares: I understood not. Just at the recess I asked your Honor what the ruling was and your Honor said you would announce the ruling upon return.

The Court: I very clearly made a ruling shortly after one——

Mr. Soares: Well, I renew the motion now in view of the [295] testimony given that this cause be continued to a future date, preferably to the 28th of this month, in order that we may procure the attendance of Mary Chang to testify as a witness on sur-rebuttal to contradict the evidence given by Sarah Lee Wright on rebuttal.

The Court: The same ruling and for the same reasons as heretofore stated.

Mr. Soares: Just to make doubly sure, may I have a little exception? I am a little bit careful about exceptions, so I will note them.

The Court: Well, you look at Rule 51 of the Federal Rules of Procedure. All right, now. I assume we are ready for argument. Do you want a brief recess?

Mr. Soares: If the Court please, I am awfully sorry but I would like to go to the door and see if a certain person is there.

The Court: Very well.

(Mr. Soares leaves courtroom for a moment and returns.)

Mr. Soares: Very well, your Honor.

Mr. Richardson: Your Honor, could we have a short recess? I have no further proof.

The Court: You have closed your case?

Mr. Richardson: Yes, sir.

The Court: And Counsel for the Defendants has closed?

Mr. Soares: Yes, under the situation that [296] exists.

The Court: We will take a brief recess, then, and we will be ready for argument.

(A short recess was taken at 2:33 p.m.)

The Court: The jury is all present. You may proceed with the opening argument.

(Mr. Richardson presented the opening argument.)

(Mr. Soares presented the argument for the Defense.)

(Mr. Richardson presented the closing argument.)

The Court: Gentlemen of the Jury, I assume that the jury knows that at the close of a trial Counsel in this jurisdiction are permitted to make requests for instructions for the Court to give. Now, they have done that in this case. Some requests were granted; some were denied. The Court in a Federal jurisdiction has a right to instruct the jury itself upon its own motion or inclination. It seems to me that the instructions that are offered here are sufficient for this case. They, for the most part, cover the well-grounded principles that relate to criminal

law. And as to Counsels' remarks, it does not make any difference whether you agree with them yourself. Whatever instructions you are given by the Court are to be taken by you as the law pertaining to the criminal case. And your own version of the law should not enter into this, if [297] you have any. It is the Court's business to instruct you in the law, and the Court is presumed to know the law.

The first thing I want done is to have the indictment read. Mr. Clerk, will you read the indictment in the case? Give the reference to the United States law there upon which the indictment is based.

The Clerk: That is Title 18 U.S.C., Section 2421.

(The Clerk read the indictment.)

The Court: I instruct you, gentlemen of the jury, that you cannot convict the defendants unless the government has established the truth of each and every material allegation of the indictment to your satisfaction and beyond all reasonable doubt. The material allegations of the indictment are:

1. That Miner Lii and Alice Lii
2. knowingly, wilfully, unlawfully, and feloniously
3. did procure and obtain
4. from the office of Pan-American Airways at 222 Stockton Street, San Francisco, California,
5. a ticket to be used by Sara Wright

6. in going from San Francisco to Honolulu for the purpose of prostitution, debauchery, and other immoral purposes,
7. which said ticket was used by said Sara Wright for the purpose aforesaid.

If the prosecution has failed to prove any one or more of the aforelisted material allegations of the indictment beyond reasonable doubt, you must find the defendants not guilty. [298]

The gist of this offense is the knowingly procuring and obtaining of a ticket to be used by any woman or girl in going to any place for the purpose of prostitution or for any other immoral purpose. If you find from the evidence beyond a reasonable doubt, that the Defendants, Miner Lii and Alice Lii, did knowingly procure and obtain a ticket which Sarah Lee Wright used in coming to Hawaii for the purpose of prostitution then you should convict. However, if you have a reasonable doubt as to the foregoing, then you should acquit.

The indictment in this case, or any other case for that matter, is a mere accusation and is not of itself any evidence, not the slightest, of the defendants' guilt, and no juror should permit himself to be to any extent influenced because or on account of the indictment that was brought against the defendants.

From that it must be clear to you what I mean. The indictment is the first step, is the step to bring the case into court here for a trial before a jury, and in itself it is no evidence or proof of anything. It is merely an allegation, an accusation. What you

deal with is the proof, the facts, the testimony, from the evidence given.

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. He is not [299] required to put in any evidence at all upon the subject. The burden of proof is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime, the crime charged.

The defendants have entered a plea of not guilty to the charges in this case, and such plea puts in issue the allegations contained in the indictment and requires the Government to prove such allegations to your satisfaction beyond all reasonable doubt before a verdict of guilty can be returned against the defendants.

In criminal cases, even when the evidence is so strong that it demonstrates the probability of the guilt of the party accused as set forth in the written charge, still if it fails to establish beyond a reasonable doubt the guilt of the defendant in the manner and form as charged, then it is the duty of the jury to acquit the defendant and bring in a verdict of not guilty. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chances, it is more probable that a defendant is guilty.

Under the law no jury should convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance

of all of the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before [300] the defendant can be convicted of crime is not suspicion, not mere probabilities, but proof of his guilt beyond all reasonable doubt.

While the accused at the beginning of the trial is presumed, as a matter of law well-established, to be innocent, and this presumption follows him throughout the entire trial, yet if the proof establishes guilt beyond a reasonable doubt, then the presumption of innocence disappears or is overthrown.

A reasonable doubt may arise from the evidence or it may arise from the lack of evidence. It is such a doubt as would cause you, as reasonable men, to hesitate to act upon it in matters of importance to you. It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge or the occurrence of a particular essential event, or the existence of a thing. It is a matter that may be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the court, you are not satisfied beyond a reasonable doubt that the defendants are guilty as charged in the indictment, you will, of course, return a verdict of acquittal.

As I said before, this matter of reasonable doubt

has been [301] given many definitions by different courts at different times and places. It simmers down to final analysis for the jurymen using their good, honest, common sense about it, whether they have a reasonable doubt based upon reasonable substantial grounds one way or the other.

A defendant in a criminal case need not take the witness stand or offer any evidence in his behalf. Nor can you take into consideration in arriving at your verdict any reason or motive which may have actuated him in not offering a defense in his own behalf. There are several reasons why a defendant might deem it advisable not to offer testimony. For instance, he may be relying for an acquittal upon the requirement that the prosecution must prove his guilt beyond all reasonable doubt, or, he may feel that though innocent of the particular crime charged, giving evidence which would clear him of the offense charged might tend to indicate his guilt of some other offense.

If you cannot reconcile the statements of witnesses on account of contradictions, then you have a right to believe the witness or witnesses you determine most worthy of credit and disbelieve the witness or witnesses whom you believe least worthy of credit. That is within your right. You may believe any witness or witnesses that your judgment dictates are telling the truth or substantial truth which is sufficient for the case, or you may disbelieve any or all of them. In determining [302] whom you will believe, you may consider the nature of the evidence given by them; how far they are corrobora-

rated or contradicted by other testimony; and in weighing the testimony and determining the credibility of the witnesses it is proper for you to take into consideration all the surrounding circumstances, all the surrounding circumstances of the witnesses as brought out in the evidence, and such other facts appearing in the evidence as will, in your opinion, aid you in determining whom you will believe; and you may also, in considering whom you will or will not believe, take into account your experience and relations among men.

You understand that you are the sole judges of the evidence and the weight of the evidence, and you have seen the witnesses and heard them, and it is up to you to consider to the best of your judgment and without any reasonable, well-grounded doubt in your mind as to the guilt or innocence of these people, or either of them.

Now, when you go into the jury room, you will be under the general custody of the Marshal. One of the first things you will do is to select a foreman from your number who will sign whatever verdict or verdicts you arrive at. You know, I think, very well that your verdict must be unanimous. It takes all 12 of you to join in whatever verdict is brought to the Court. I don't know that there is anything more that need^m be said to you. You have heard all the evidence. I [303] believe that you understand the instructions. Sometimes instructions seem to impress jurymen as being somewhat in conflict one with the other. Upon a strict closer analysis that isn't true. The Court wouldn't give them if

they were in contradiction. You shouldn't center on any particular instruction as being the sole or the principal guide but take them as a whole. These instructions that were given, all of them, practically all were given by request and they are principles of law that pertain to criminal cases. And the matter of your judgment rests in your good sense in construing the evidence, the testimony and other evidence that you have heard in the case.

Mr. Clerk, swear the Marshals. And the jury will pay attention to the oath given to the Marshals because you are asked to cooperate with the Marshals in the fulfillment of their duties.

Marshal Heine: May it please the Court, I'd like to have three of us sworn in due to the fact that we may have to alternate during the night.

The Court: That is agreeable to the Court.

Marshal Heine: Thank you.

(Marshal Heine and Deputies Bruns and Moses were sworn to take charge of the jury.)

The Court: Now, the clerk has forms of verdicts which I have examined and found to be in order. You pass them to [304] the Marshal who will pass them to some member of the jury who will be selected as foreman.

Mr. Soares: May I see them, if the Court please?

The Court: Yes.

(Handed to Mr. Soares.)

Marshal Heine: If the jurors want further instructions, I'd like to have them written. Will you so instruct the jurors, your Honor?

The Court: What's that?

Marshal Heine: Have them write it if they want further instructions.

The Court: Oh, yes. If it should come to a situation where there is any confusion about the instructions given or the jury feel in real need of any further instructions just write a little note and pass it to the Marshal who is directly in attendance. He will bring it to the Court and in that event you have to come back to the Court and state what it is that you want further instruction about, and it will be given. The jury may retire now, and proceed with your deliberations.

(The jury retired at 4:04 p.m.)

(The jury returned with a verdict at 4:55 p.m.)

The Court: Gentlemen, who is your foreman?
Mr. Ford. I am.

The Court: Has the jury arrived at a verdict?

Mr. Ford: We have. [305]

The Court: Please pass it to the clerk. (Handed to the Court.) This is the unanimous verdict of the jury, is it?

Mr. Ford: Yes, sir.

The Court: Mr. Clerk, read the verdict.

The Clerk: Omitting the heading, title and cause—

“We the jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendant, Miner Lii, Guilty as charged in the indictment herein.

“Dated: Honolulu, T. H., this 23rd day of May, 1951.

“/s/ EARL J. FORD,

“Foreman.”

Omitting heading, title and cause. Verdict—

“We, the jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Alice Lii, Guilty as charged in the indictment herein.

“Dated: Honolulu, T. H., this 23rd day of May, 1951.

“/s/ EARL J. FORD,

“Foreman.”

The Court: Upon the finding of the jury, the Court adjudges both defendants to be guilty as charged.

Mr. Soares: The defendants except to the verdict and plead that it is contrary to the law and evidence and give notice of motion for a new trial.

The Court: When will the defendants be ready for sentence?

Mr. Soares: I suggest some time next week, if the Court please. We have to get ready for a trial in this Court tomorrow and trials in the early part of the week in the [306] Territorial courts. I suggest that it stand over at least one week for sentence.

The Court: That will be May 31st at the hour of ten o'clock in the morning. All right. The jury

is excused now until tomorrow morning at 9:30. Be present with the other jurors for the new criminal trial to start at 9:30 tomorrow morning. And we will call this a day. You are excused until that time.

(The Court adjourned at 5:05 p.m.) [307]

Reporter's Certificate

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings reported by me in Criminal No. 10,419, United States of America versus Miner Lii and Alice Lii, held in the above-named Court on May 21, 22 & 23, 1951, before the Hon. Delbert E. Metzger, Judge, and a jury.

June 20, 1951.

/s/ ALBERT GRAIN.

[Endorsed]: Filed July 6, 1951. [308]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause consists of the fol-

lowing listed original pleadings, exhibits, and transcript of proceedings:

Indictment.

Instructions to the Jury.

Verdict (Miner Lii).

Verdict (Alice Lii).

Judgment and Commitment (Miner Lii).

Judgment and Commitment (Alice Lii).

Notice of Appeal.

Order Admitting to Bail Pending Appeal to the Ninth Circuit Court of Appeals.

Bond (Miner Lii).

Bond (Alice Lii).

Designation of Record on Appeal.

Stipulation.

Counter-Designation of Record on Appeal.

Transcript of Proceedings commencing on May 21, 1951, and ending on May 23, 1951.

Plaintiff's Exhibits "A-1," "A-2," "B," and "C."

I further certify that included in said record on appeal is a copy of the Minutes of Court of May 21, 22, 23, and 31, 1951.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 7th day of July, A.D. 1951.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

[Endorsed]: No. 13005. United States Court of Appeals for the Ninth Circuit. Miner Lii and Alice Lii, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed July 9, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 13005

MINER LII and ALICE LII,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANTS-APPELLANTS
ON APPEAL

Come now Miner Lii and Alice Lii, Defendants-Appellants in the above-entitled cause, by O. P. Soares, their attorney, and in conformance with Rule 9 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit and hereby state that it is intended that defendants-appellants will rely upon the following points, to wit:

1. That the United States District Court for the District of Hawaii erred in ordering that the defendants be taken into the custody of the United States Marshal in the presence of the jury summoned to try the above-entitled cause.

2. That the United States District Court for the District of Hawaii erred in permitting evidence of the actions of the prosecutrix and of the defendants after their arrival in Honolulu subsequent to the

commission of the crime alleged in the indictment, the commission of said crime having been completed in San Francisco and before their arrival in Honolulu.

3. That the United States District Court for the District of Hawaii erred in permitting, over objection, leading questions to the prejudice of defendants-appellants' right to a fair and impartial trial.

4. That the United States District Court for the District of Hawaii erred in permitting, over objection, questions and answers which were wholly immaterial to the issues and could serve no purpose other than to prejudice defendants-appellants' right to a fair and impartial trial.

5. That the United States District Court for the District of Hawaii erred in permitting the prosecutrix to remain in the Court, although the jury was excluded, defendants-appellants made an offer of proof to be elicited on cross-examination of the prosecutrix.

6. That the United States District Court for the District of Hawaii erred in unduly limiting the scope and extent of the cross-examination of the prosecutrix and in unfairly and unfavorably and prejudicially characterizing the cross-examination.

7. That the United States District Court for the District of Hawaii erred in refusing to permit defendants-appellants on cross-examination of a government witness to fully inquire into the character and criminal activities of said witness.

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No. 13,005

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MINER LII and ALICE LII,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

**On Appeal from the United States District Court
for the Territory of Hawaii.**

BRIEF FOR APPELLANTS.

O. P. SOARES,

Union Trust Building, Honolulu, Hawaii,

Attorney for Appellants.

FILED

NOV - 8 1951

**PAUL P. O'BRIEN
CLERK**



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judgment made and entered May 31, 1951 (R. pp. 11-13). Notice of appeal therefrom was filed May 31, 1951 (R. p. 14). The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure, jurisdiction of this Court to review the final judgment of the District Court is sustained by 28 U.S.C., Judiciary and Judicial Procedure, Sections 1291, 1294.

II.

STATEMENT OF THE CASE.

Miner Lii and Alice Lii, husband and wife, and appellants herein, were jointly indicted by the grand jury on March 14, 1951, for violation of Section 2421, Title 18, United States Code. The indictment charges that on or about October 9, 1950, defendants purchased a ticket from the office of Pan American World Airways in San Francisco, California, to be used by one Sarah Lee Wright in interstate travel from San Francisco, California, to the city and county of Honolulu, Territory of Hawaii, for the purpose of practicing prostitution in Honolulu, and that such ticket was so used by Sarah Lee Wright for the aforesaid purpose.

The defendants were tried jointly and were both convicted.

The questions involved in the appeal relate to (a) whether the Court's action in ordering defendants into custody of the United States Marshal in the presence of the jury prevented defendants from ob-

taining a fair trial; (b) the admission of certain evidence on behalf of the prosecution relating to events which happened after the alleged crime was complete, to which objection was duly taken; (c) the Court allowing the prosecution to ask leading questions, and questions immaterial but prejudicial to defendants, over objections; (d) the action of the Court in allowing the prosecutrix to remain in Court, although the jury was excluded, while defendants-appellants made an offer of proof of facts to be elicited from the prosecutrix on cross-examination; (e) the action of the Court in limiting the scope and extent of the cross-examination of the prosecutrix and of commenting on her cross-examination in a manner unfavorable and prejudicial to defendants-appellants; (f) the refusal of the Court to allow defendants-appellants on cross-examination of a government witness to fully inquire into the character and criminal activities of the witness; (g) the Court's adverse ruling upon defendants-appellants' motion for a directed verdict as to defendant Miner Lii; (h) the Court's refusal to permit defendants-appellants to elicit corroboration of testimony contradicting previous testimony of prosecutrix; (i) the action of the Court in allowing cross-examination of defendant Alice Lii on matters not referred to in her direct testimony; (j) the action of the Court in permitting improper questions of witnesses called in rebuttal; (k) the Court's refusal to allow defendants-appellants a reasonable continuance in order to procure a witness whose testimony was made necessary by testimony adduced by the prosecu-

tion on its case in rebuttal and in allowing prosecution, on rebuttal, to adduce evidence of other crimes allegedly committed by defendants but not related to the crime alleged in the indictment.

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court erred in overruling defendants' objection to trial by that jury in front of which they had been found guilty of contempt, fined and placed in custody of the United States Marshal.

2. The Court erred in permitting evidence of the action of the prosecutrix and of the defendants after their arrival in Honolulu subsequent to the commission of the crime alleged in the indictment, the commission of said crime having been completed in San Francisco and before their arrival in Honolulu.

3. The Court erred in permitting, over objection, leading questions to the prejudice of defendants-appellants' right to a fair and impartial trial.

5. The Court erred in permitting the prosecutrix to remain in the court, although the jury was excluded (while) defendants-appellants made an offer of proof to be elicited on cross-examination of the prosecutrix.

6. The Court erred in unduly limiting the scope and extent of the cross-examination of the prosecutrix

and in unfairly and unfavorably and prejudicially characterizing the cross-examination.

7. The Court erred in refusing to permit defendants-appellants on cross-examination of a government witness to fully inquire into the character and criminal activities of said witness.

8. The Court erred in overruling defendants-appellants' motion for a directed verdict as to defendant Miner Lii.

9. The Court erred in not permitting defendants-appellants to elicit corroboration of testimony contradicting testimony theretofore given by prosecutrix.

10. The Court erred in permitting cross-examination of defendant Alice Lii on matters not referred to in her direct testimony.

11. The Court erred in permitting improper questions of witnesses called in rebuttal.

12. The Court erred in permitting a continuance of the trial in order that the prosecution might produce additional witnesses, and in refusing to permit defendants-appellants to have a reasonable continuance in order to procure a witness whose testimony was made necessary by testimony adduced by the prosecution on its case in rebuttal.

13. The Court erred in permitting on rebuttal evidence of other crimes alleged to have been committed by defendants and not related to the crime alleged in the indictment.

IV.

ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN OVERRULING DEFENDANTS' OBJECTION TO TRIAL BY THAT JURY IN FRONT OF WHICH THEY HAD BEEN FOUND GUILTY OF CONTEMPT, FINED AND PLACED IN CUSTODY OF THE UNITED STATES MARSHAL (R. p. 27).

The Court convened on Monday, May 21, 1951, to try the defendants. There were twenty-eight jurors present when defendants entered the courtroom nearly one hour after the Court had convened for their trial. The Court said, "You kept 28 jurors waiting here now for practically an hour. The Court finds you in contempt, each of you, for not being here when your case was called. And I fine you each \$50 apiece, and you will be in custody of the Marshal until that fine is paid." (R. p. 26). At page 27 of the record defense counsel clearly indicates his belief that the Court's action was "prejudicial to the defendants' rights to a fair and impartial trial, the Court having found in the presence of the jury the defendants guilty in contempt and assessing a fine and ordering them into the custody of the Marshal. I submit that it interferes with their obtaining a fair and impartial trial." This was, in effect, an objection to trial by a jury selected from this jury panel, was so treated by the Court, and overruled.

It is defendants' contention that they made an honest mistake as to the trial date, and that even though the Court elected to believe otherwise, summary punishment should not have been awarded them

in the presence of the jury. The asperity with which the Court castigated them for their tardiness, the Court's reference to the fact that they had kept the twenty-eight jurors waiting almost an hour and their subsequent fine for contempt and the Court's order placing them in the custody of the marshal made it impossible for defendants to obtain a fair and impartial trial from a group of men who had witnessed these proceedings. Under the circumstances it was the duty of the Court to discharge the jury panel, and its failure so to do deprived the defendants of their rights to trial *by an impartial jury*, and was a violation of the Fifth and Sixth Amendments to the Constitution of the United States.

SPECIFICATION OF ERROR NO. 2.

THE COURT ERRED IN PERMITTING EVIDENCE OF THE ACTION OF THE PROSECUTRIX AND OF THE DEFENDANTS AFTER THEIR ARRIVAL IN HONOLULU SUBSEQUENT TO THE COMMISSION OF THE CRIME ALLEGED IN THE INDICTMENT, THE COMMISSION OF SAID CRIME HAVING BEEN COMPLETED IN SAN FRANCISCO AND BEFORE THEIR ARRIVAL IN HONOLULU (R. pp. 42-46).

At the beginning of Chapter 117—White Slave Traffic, Title 18, § 2421, U.S.C.A., appears a section entitled "Historical and Revision Notes" from which the following language is quoted, "Section consolidates sections 397, 398, 401 and 404 of Title 18, U.S.C., 1940 ed." The word "section" as used in the foregoing, obviously refers to Section 2421 of Title 18, U.S.C.A.

The gravamen of the offense condemned by that paragraph of Section 2421, under which defendants are charged, is the acquisition of a ticket by any person for the use of any female person when such ticket is to be used by her for transportation in interstate commerce to a place for any immoral purpose, and such female is thereby transported in interstate commerce. The crime is therefore complete when the purchaser acquires the ticket with the intent that a female transports herself in interstate commerce to a place for an immoral purpose, and the woman travels on such ticket in interstate commerce. It is therefore respectfully submitted that if the prosecutrix were in fact given a ticket in San Francisco by the defendants, they having the intent that she should use it to travel to Honolulu for the purpose of engaging in prostitution, and that she so used same (all of which the prosecution attempted to prove), then the crime would have been committed as soon as the prosecutrix had used said ticket and had actually begun her trip to Honolulu, it being immaterial whether she ever arrived there or not. It was therefore improper, and highly prejudicial to defendants, to permit testimony tending to show evidence of other crimes with which they are not charged, allegedly committed in Honolulu subsequent to the commission of the offense alleged in the indictment (R. pp. 42-46). Whether or not prosecutrix engaged in prostitution at the defendants' home after arriving in Honolulu is immaterial to the charge.

In the case of *Cholakos v. United States*, 2 F. (2d) 447 (1924), defendant was indicted for an alleged violation of White Slave Traffic Act (Com. St. §§ 8812-8819). In that case the Court considered one of the instructions given by the trial Court and said:

“In the course of the charge the court said, in substance, that if defendant furnished the girl, when outside of Ohio, the means of transportation into that state, thereby inducing her to make the trip for the purpose charged, it would be immaterial whether the prostitution took place after she reached Ohio. This instruction correctly stated the law. *Wilson v. United States*, 232 U.S. 563, 570, 34 S. Ct. 347, 58 L. Ed. 728; *Rizzo v. United States* (C.C.A. 3), 275 F. 51, and cf. *Athanasaw v. United States*, 227 U.S. 326, 33 S. Ct. 285, 57 L. Ed. 528; Ann. Cas. 1913 E, 911.”

In the *Cholakos* case certiorari was denied in 45 S. Ct. 464, 267 U.S. 604, 69 L. Ed. 809.

Since it is clearly the law that when the tickets (or money), supplied by a defendant for the purposes alleged in the indictment, are used by a female for transportation in interstate commerce, the offense is complete, and the subsequent acts of prostitution committed by Sarah Lee Wright in Honolulu are immaterial to the charge and could have been introduced by the prosecution for the sole purpose of prejudicing the jury, and having been properly objected to by the defense, should have been excluded by the Court.

More than that, the Court was without jurisdiction to hear any evidence since this prosecution was not

permitted for the reason that it was not "had in a district in which the offense was committed." (Rule 18, Federal Rules of Criminal Procedure).

SPECIFICATION OF ERROR NO. 3.

THE COURT ERRED IN PERMITTING, OVER OBJECTION, LEADING QUESTIONS TO THE PREJUDICE OF DEFENDANTS-APPELLANTS' RIGHT TO A FAIR AND IMPARTIAL TRIAL (R. pp. 37, 40, 43, 203).

It is respectfully submitted that the testimony of Sarah Lee Wright, the key witness for the prosecution, was adduced on direct examination as the result of leading questions by the prosecutor, improperly allowed over the objections of defense (R. pp. 37, 40, 43). This witness, on direct examination, made one direct quotation of what she said to defendants (R. p. 36) and none of what they said to her, during that period about which she was being questioned. In all relevant phases of her testimony, her answers were suggested by the prosecutor's questions. Similarly, in rebuttal, when the prosecutor wanted to intimate that she was not staying with defendants voluntarily, the Court permits her to answer the question, "Could you leave there by yourself?" (R. p. 203). It is submitted that this last question, together with those objected to at (R. pp. 37, 40, 43), was so suggestive and prejudicial to defendants as to deny them their rights under the Fifth and Sixth Amendments to the Constitution of the United States, and the objections thereto were erroneously overruled by the Court.

58 Am. Jur., Witnesses, § 570: The rule against asking one's own witness leading questions is not an absolute rule of exclusion; on the contrary, the allowance of leading questions on direct examination is within the discretion of the trial judge. Ordinarily, that discretion is to be exercised so as to permit such questions to be put to a witness on his direct examination when he is manifestly hostile to the interest of the party calling him; when there is difficulty in getting direct and intelligible answers by reason of the ignorance of the witness or his unfamiliarity with the English language; when he has exhausted his memory without stating the particular required; when the answers of a witness have taken by surprise the party calling him; when the subject of inquiry is a proper name or other fact which cannot be arrived at by a general inquiry; or when the witness is a child of tender years whose attention cannot be otherwise called to the subject matter, or is of feeble mind, or a deaf mute.

Since the witness Sarah Lee Wright was not shown to be within any of the above named group for whom the Court ordinarily is justified in relaxing the general rule that leading questions are not to be asked on direct examination, it is respectfully submitted that the Court erred in relaxing the rule in her case.

SPECIFICATION OF ERROR NO. 5.

THE COURT ERRED IN PERMITTING THE PROSECUTRIX TO REMAIN IN THE COURT, ALTHOUGH THE JURY WAS EXCLUDED, (WHILE) DEFENDANTS-APPELLANTS MADE AN OFFER OF PROOF TO BE ELICITED ON CROSS-EXAMINATION OF THE PROSECUTRIX (R. p. 52).

It is respectfully submitted that the Court abused its discretion when it overruled defendants-appellants' motion that the witness Sarah Lee Wright be excluded from the Court while defendants-appellants offered to prove that she had practiced prostitution since leaving defendants' home, despite her testimony to the contrary, thus demonstrating her immorality and attacking her general credibility. It is significant, however, that the Court excused the jury on its own motion.

The witness on cross-examination had been hostile, tricky and evasive (R. pp. 7-51). Defendants-appellants offered to prove by cross-examination certain facts which the witness had indicated she did not care to admit. Under the circumstances, it is respectfully submitted that the Court, in allowing her to be forewarned as to subsequent examination, grossly abused its discretion.

3 *F.R.D.* 384: The exclusion of witnesses from the courtroom is another matter which is left to the discretion of the trial judge, *who should take this step when the presence of witnesses may interfere with a fair trial.* (Italics added.)

The ruling of the Court in this instance deprived defendants-appellants of that most useful weapon of

the cross-examiner, the element of surprise, and gave this extremely hostile witness time in which to prepare herself for the subsequent line of inquiry. Due to this erroneous ruling of the Court the witness was forewarned and to be forewarned is to be forearmed. It is significant that when appellants made an offer of proof when their own witness, Harold John Lewis, was on the stand, that the prosecution elected to have Mr. Lewis excluded from the courtroom.

SPECIFICATION OF ERROR NO. 6.

THE COURT ERRED IN UNDULY LIMITING THE SCOPE AND EXTENT OF THE CROSS-EXAMINATION OF THE PROSECUTRIX AND IN UNFAIRLY AND UNFAVORABLY AND PREJUDICIALLY CHARACTERIZING THE CROSS-EXAMINATION (R. pp. 70, 80, 85).

It is respectfully submitted that the remarks of the Court in reference to cross-examination of prosecution's witness, Sarah Lee Wright, were prejudicial to defendants-appellants and tended to influence the jury against defendants-appellants. At (R. p. 68) the Court said, "Well, now, this is not proper cross-examination"; at (R. pp. 68-69) "You may go ahead with that, but you are going so far afield that it is just simply killing time." (At R. p. 70) the Court said, "Well, now, there are just so many Louises in the world or people of that name that that is not a fair question unless——." At (R. p. 85) the Court said, "Well, there is just so much of this so-called cross-examination that it seems to me it is just a sort

of a fishing excursion. Counsel, I don't feel that it would be proper to give you any more than ten minutes' additional time to finish your cross-examination"; and again at (R. p. 85) when counsel explains that he needs more than ten minutes as he has covered only one phase of the witnesses testimony, the Court answers, "Well, you had better get on another phase, then, if it is of importance to you."

During that portion of the trial covered by the Record pages 68-85, defendants-appellants were attempting to discredit a hostile, strangely forgetful, vague and evasive witness. The Court's interruptions, its insistence on strict cross-examination (R. p. 75), its derogatory remarks in front of the jury, its imposition of a time limitation, all were highly prejudicial to defendants-appellants and were, it is respectfully submitted, error.

58 Am. Jur., Witnesses, § 630: The general Statement of the rule that cross-examination must be confined to the matters which have been stated in the examination in chief has not always been strictly adhered to. * * * Exceptions exist where the questions are asked to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements. The rule should be liberally construed so as to permit on cross-examination any question which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, *or to test his accuracy, memory, veracity, character, or credibility.* Moreover, the rule *must*

be relaxed where literal enforcement thereof would only serve to defeat the ends of justice. (*Italics added.*)

The case of *Conley v. Mervis*, 324 Pa. 577, 188 A 350, 108 A.L.R. 160 (1936), was one in which the defendant-appellant had been denied the right, in the trial Court, of being cross-examined by his counsel after he admitted on the stand that he owned the license plates on the truck which injured plaintiffs-appellees, but denied owning the truck itself. The Court refused to permit the examination on the ground that matters of defense could not be brought out under the guise of cross-examination but must be brought out as part of his own case. In announcing the Pennsylvania Supreme Court's ruling reversing this decision, Chief Justice Kephart said as follows:

“Nothing is better established than that cross-examination in many cases may reach beyond the facts elicited on direct examination and embrace new matter. As early as 1848 Chief Justice Gibson, the creator of the Pennsylvania rule, in *Bank v. Fordyce*, 9 Pa. 275, at page 277, 49 Am. Dec. 561, said, ‘A party is entitled (on cross-examination) to bring out every circumstance relating to a fact which an adverse witness is called to prove.’ Or, as the rule is sometimes stated, it is competent on cross-examination to develop all circumstances within the witness’ knowledge which qualify or destroy his direct testimony, although, strictly speaking, they constitute new matter and are part of the cross

examiner's own case." *Felski v. Zeidman*, 281 Pa. 419, 126 A. 794; *Quigley v. Thompson*, 211 Pa. 107, 60 A. 506; *Jackson v. Litch*, 62 Pa. 451.

In the case of *Hopkins v. State*, 130 Pac. 1101 (Okla. 1913) at page 1104, a murder case, the Court states the following as the rule for the permissible limits of cross-examination:

As to what is the proper practice on cross-examination of witnesses the general rule is that the party cross-examining should be confined to the matters concerning which the witness has been examined in chief; but this rule should be liberally construed so as to permit any questions to be asked on cross-examination reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or to test his accuracy, memory, veracity, character, or credibility * * *.

It is submitted that this latter citation is a true statement of the law; that the Court's characterization of questions as unfair (R. p. 68), its insistence on strict cross-examination (R. p. 75), its description of defendants-appellants' cross-examination as "so-called" (R. p. 85), and its limiting defendants-appellants remaining cross-examination of Sara Lee Wright to ten minutes (R. p. 85), were so prejudicial to defendants-appellants as to deny them a trial by an impartial jury as guaranteed by the 6th Amendment to the Constitution of the United States.

SPECIFICATION OF ERROR NO. 7.

THE COURT ERRED IN REFUSING TO PERMIT DEFENDANTS-APPELLANTS ON CROSS-EXAMINATION OF A GOVERNMENT WITNESS TO FULLY INQUIRE INTO THE CHARACTER AND CRIMINAL ACTIVITIES OF SAID WITNESS (R. pp. 80, 85, 86, 218).

It is respectfully submitted that it was an abuse of discretion for the Court to restrict defendants-appellants' remaining cross-examination to ten minutes at a time when defendants-appellants were seeking to prove the bad character and previous criminal background of the witness, Sarah Lee Wright (R. p. 85), and that it was further error (regardless of whether or not the Court intended to so limit the time for defendants-appellants to finish cross-examination) to again indicate that cross-examination was to be so limited by its subsequent remarks, "Well, you had better get on another phase, then, if it is of importance to you," (R. p. 85), and, "Well, you had better proceed with your cross-examination."

At this stage of the cross-examination defendants-appellants were attempting to impeach the witness by showing that she had been a prostitute while in the continental United States, a fact previously denied (R. p. 80); by attempting to show by the circumstances surrounding her trip to Maui that she had gone there for the purpose of prostitution (R. p. 81); by attempting to get the witness to elaborate on the circumstances of her arrest, and confession of prostitution to the Maui police (R. p. 82), and, later, by attempting to show her affair with a man who is presumably married (R. p. 218). All of these matters,

and those which defendants-appellants sought to adduce after the Court put a time limit on subsequent cross-examination, went to the witness' credibility, occupation, social connections, manner and place of living, and other relevant matters.

58 *Am. Jur., Witnesses*, §674: The impeachment of a witness embraces all means having the purpose and tendency to impair his credit. It involves proof of matters affecting the general credit of a witness as well as those affecting his credit in the particular case.

58 *Am. Jur., Witnesses*, §691: By the great weight of authority it is permissible upon cross-examination to inquire into the antecedents of a witness by showing his occupation, social connections, manner and place of living, and the like. Being matters largely of his own choice, they indicate his true character. He is, therefore, responsible for them, and they may be inquired into for the purpose of affecting his credibility. This is useful in enabling the court or jury to comprehend just what sort of person they are called upon to believe. *Viberg v. State*, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22; *People v. Bond*, 281 Ill. 490, 118 NE 14, 1 ALR 1397; *Cochran v. United States*, 157 US 286, 39 L ed. 704, 15 S.Ct. 628; *Sawyer v. United States* (CCA 9th) 27 F. 2d 569 (writ of certiorari denied in 278 US 650, 73 L ed. 562, 49 S.Ct. 96) citing RCL; *Paxton v. State*, 114 Ark. 393, 170 SW 80, Ann. Cas. 1916 A 1239; *State v. Fong Loon*, 29 Idaho 248, 158 P. 233, LRA 1916 F 1198; *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203.

Who can say what might have been developed by a more comprehensive cross-examination of this hostile and evasive witness, had same not been curtailed by the Court? Since the appellants' defense, due to the circumstances and nature of the charge, depended almost entirely on the results of the cross-examination of the prosecutrix, it is submitted that the Court erred in not allowing the defense to go fully into the witness, Sarah Lee Wright's, character and criminal activities.

SPECIFICATION OF ERROR NO. 8.

THE COURT ERRED IN OVERRULING DEFENDANTS-APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO DEFENDANT MINER LII (R. p. 128).

It is respectfully submitted that at the time defendants-appellants moved for a directed verdict as to defendant Miner Lii, the salient points of direct testimony of the prosecutrix, Sarah Lee Wright, whether credible or not were, in so far as Miner Lii was concerned, as follows:

(1) Witness met defendants in October of 1950 in San Francisco (R. p. 34).

(2) Witness and defendants talked in a car outside the bar where she had met them (R. p. 35).

(3) *They* asked her if she wanted to come to Honolulu to work—and she concludes that “work” meant prostitution, it was the “understanding” between them (R. p. 36). (This is the witness who de-

nies ever having been a prostitute before coming to Honolulu) (R. pp. 217, 221).

(4) They told her what everything was going to be like (R. p. 36).

(5) Witness told them she would let them know (R. p. 37).

(6) The third day after the first meeting witness "let them know for sure if I was coming or not" (R. p. 38).

(7) "Well, both of them knew I (witness) was coming (R. p. 38).

(8) The witness heard defendant Alice Lii make three reservations on Pan-American, one of which was for the use of the witness (R. p. 40).

(9) When witness first talked to them, he (presumably Miner Lii or Junior Sampson) (R. p. 90) said he'd pay her way (R. p. 41).

(10) Witness, the Liis and Mary Chang left for Honolulu by plane, Monday morning.

We submit that no other testimony adduced by direct examination was properly before the Court at the time the motion for a directed verdict was made (Assignment No. 11).

On cross-examination the witness, Sarah Lee Wright, added the following significant testimony to that adduced by her direct examination:

"It is the same time I told them I was broke and that I couldn't go, the only reason I couldn't

go; and *they* said, that was quite all right, *they'd* buy my ticket" (R. p. 91) * * * and * * * "*They* called up and got my ticket, and *they* went down and picked it up. *I wasn't with them then*". (R. p. 96).

The witness Edward George Valazquez's testimony was to the effect that he was the senior cashier of Pan-American Airways in San Francisco; that on October 7 tickets bearing consecutive numbers were issued by Pan-American to the Liis and Sarah Lee Wright.

The witness Frank Sampson testified he knew the defendants and prosecutrix, had been with them in San Francisco and had driven the Liis, Sarah Lee Wright and Mary Chang to the airport the day they left for Honolulu, and that he had seen Sarah Lee Wright at the Liis when he, the witness, visited the Liis for three weeks subsequent to the San Francisco encounter. On cross-examination he admitted living with Sarah Lee Wright for sometime in Honolulu, after the visit with the Liis.

It is submitted that a prima facie case had not been made against defendant Miner Lii at this point. He is charged with obtaining a ticket to be used by Sarah Lee Wright to travel in interstate commerce to a place for immoral purposes, and that she so used the ticket for such purposes. There is not one iota of evidence tending to prove that Miner Lii procured or obtained a ticket from Pan-American Airways for Sarah Lee Wright's use. There is testimony that de-

fendant Alice Lii made a phone call to reserve a ticket for Sarah Lee Wright, but if this be a crime, the charge is not conspiracy, and the criminal act, if any, of Alice Lii is not imputable to her husband. All through Sarah Lee Wright's testimony, she says "*they said*" so that it is impossible to tell who said what. At the time the motion in question was made there was nothing properly before the Court except prosecutrix' testimony that *either* Alice Lii or Miner Lii had asked her to come to Honolulu to work as a prostitute, that Alice Lii allegedly phoned for a plane ticket for Sarah Lee Wright, that tickets for the Liis and prosecutrix were purchased by someone on October 7th, and that Sarah Lee Wright left with the Liis for Honolulu. Under these circumstances the Court erred in denying defendants-appellants' motion for a directed verdict as to Miner Lii.

And, this is further true for the reason that from the evidence before the Court the crime alleged in the indictment was committed and completed in San Francisco and under Rule 18 of the Federal Rules of Criminal Procedure the prosecution could not be had in the district of Hawaii since San Francisco is not in that district, Hawaii being a separate and distinct district under the provisions of Section 19, Title 28, U.S.C.A. 12, c. 139, Sec. 64a, 63 Stat. 99.

SPECIFICATION OF ERROR NO. 9.

THE COURT ERRED IN NOT PERMITTING DEFENDANTS-APPELLANTS TO ELICIT CORROBORATION OF TESTIMONY CONTRADICTING TESTIMONY THERETOFORE GIVEN BY PROSECUTRIX (R. pp. 137, 139).

Sarah Lee Wright testified unequivocally that she had never been to the Island of Kauai (R. p. 71). Defendants-appellants' witness, Harold John Lewis, testified that he had seen Sarah Lee Wright sometime after September but before December (R. p. 132). After extensive cross-examination intended to cast doubt on witness' identification of Sarah Lee Wright, defendants-appellants tried to show the circumstances under which the witness had subsequently seen the prosecutrix in Honolulu, a fact brought out on cross-examination, in an effort to make the identification more certain (R. p. 137). The Court upheld the prosecution's objection to the inquiry. Defendants-appellants then offered to prove that the witness Lewis had identified Sarah Lee Wright from photographs, after seeing her on Kauai. The offer was denied by the Court (R. p. 139).

It is respectfully submitted that the Court erred in these rulings. Defendants-appellants may have had an opportunity, at this stage of trial, to show that prosecutrix had knowingly and deliberately lied under oath about this particular circumstance. Had that been shown to their satisfaction, it would have greatly affected the weight to be given her entire testimony. Her credit with the jury would have been entirely destroyed and an acquittal might have resulted. The

ruling of the Court, in effect, wrongfully denied defendants-appellants of their one clear chance to discredit this tricky and malicious witness.

58 *Am. Jur., Witnesses*, §675: "In general, it may be said that the credibility of a witness may be attacked by the testimony of other witnesses that the facts about which he has testified are otherwise than he has stated, * * *"

We submit that the verdict of the jury is evidence that they were not completely satisfied with the identification of witness Lewis of Sarah Lee Wright as the girl he saw on Kauai. Under the circumstances it was the absolute duty of the Court to allow defendants-appellants to use any proper means to convince the jury that the witness had cogent reasons for being certain in his identification.

SPECIFICATION OF ERROR NO. 10.

THE COURT ERRED IN PERMITTING CROSS-EXAMINATION OF DEFENDANT ALICE LII ON MATTERS NOT REFERRED TO IN HER DIRECT TESTIMONY (R. pp. 167, 170, 186, 187).

It is respectfully submitted that the prosecution's questions which showed that the Liis lived together as husband and wife after their divorce in 1948, and were not remarried until after the return of the indictment herein, were outside the scope of her direct examination and improperly admitted by the Court (R. p. 167). Further, it is submitted that the questions by the prosecution regarding the ownership by

Mrs. Lii of certain automobiles was also improperly admitted for the same reason (R. p. 170).

“In criminal cases the cross-examination of witnesses must be confined to the subject matter of the direct or to that closely connected therewith.” *State v. Wright*, 40 La. Ann. 589; *State v. Baker*, 43 La. Ann. 1168.

Grigsby v. Commonwealth the Court said:

“But the fact that the accused becomes a witness in his own behalf does not waive his right to object to procuring from him on cross-examination incompetent or inadmissible evidence.” 299 Ky. 721, 187 S.W. (2d) 250, 159 A.L.R. 196 (citing *Roberts v. Commonwealth*, 198 Ky. 838, 250 S.W. 115).

It is further submitted that the prosecution's questions to Mrs. Lii as to her arrest and conviction for interference with a police officer (R. pp. 186-187) were improperly admitted over objection. The transcript indicates (R. p. 190) that the conviction was appealed and further (R. p. 191), that this was a District Court conviction. In *Matsumoto v. Toraichi*, 30 Haw. 468 (1928), the Court says, at page 470, “It has been definitely held that upon general appeal (from district court to the circuit court) a trial *de novo* is required.” *Associated Repair Works v. Rogers*, 22 Haw. 91, 95 (1914); *Bell v. Palea*, 13 Haw. 278, 281 (1901); *Jardin v. Madeiros*, 9 Haw. 503 (1894).

SPECIFICATION OF ERROR NO. 11.

THE COURT ERRED IN PERMITTING IMPROPER QUESTIONS OF WITNESSES CALLED IN REBUTTAL (R. pp. 197-203, 232-248).

It is respectfully submitted that the "so-called" rebuttal testimony of the witness Sarah Lee Wright was adduced by improper questions and that there is error on every page (R. pp. 197-203) except p. 202 where it was cured by the Court.

Here the prosecution asks the witness Sarah Lee Wright about matters which she had testified to on its case in chief (R. pp. 197-198). From Record pp. 198-203 the prosecution goes into details of her alleged prostitution while at the Liis, her earnings and other irrelevant matters, all of which is improper rebuttal. Any evidence as to the actions of Sarah Lee Wright or of the defendants-appellants after their arrival in Honolulu is inadmissible as having no relevancy to the offense charged. Assignment XI *supra*.

"Rebutting evidence is evidence in denial of some affirmative case or fact which defendant has attempted to prove." *Carver v. United States*, 160 U.S. 553, 40 L. ed. 532, 16 S. Ct. 388.

The defendants-appellants have not tried to prove that Sarah Lee Wright was not a prostitute, nor that she was not in their home for some seven weeks, nor have they tried to prove as an affirmative fact any other matter to which she testified at this time. It is respectfully submitted that it was error, an error which was highly prejudicial to defendants-appellants, to allow this testimony of the prosecutrix (R.

pp. 197-203) to be adduced under the guise of rebuttal.

20 Am. Jur. Evidence § 277: Rebutting evidence is evidence in denial of some affirmative case or fact which the adverse party has attempted to prove. Such evidence should be limited to matters of rebuttal.

As to the testimony of the two car salesmen (R. pp. 232-248), it is submitted that the Court erred in admitting their testimony in under the guise of rebuttal. Possibly their testimony might have been admissible for some other purposes but it was improperly admitted as rebuttal since it was not in "denial of an affirmative fact" which defendants-appellants had tried to prove.

SPECIFICATION OF ERROR NO. 12.

THE COURT ERRED IN PERMITTING A CONTINUANCE OF THE TRIAL IN ORDER THAT THE PROSECUTION MIGHT PRODUCE ADDITIONAL WITNESSES, AND IN REFUSING TO PERMIT DEFENDANTS-APPELLANTS TO HAVE A REASONABLE CONTINUANCE IN ORDER TO PROCURE A WITNESS WHOSE TESTIMONY WAS MADE NECESSARY BY TESTIMONY ADDUCED BY THE PROSECUTION ON ITS CASE IN REBUTTAL (R. pp. 232, 272).

It is respectfully submitted that the Court abused its discretion in not granting defendants-appellants' motion for a week's continuance in order to procure a witness from the coast, particularly so when her voluntary presence at the trial was reasonably ex-

pected by defendants-appellants until the previous evening when she failed to arrive as scheduled (R. pp. 229-230), and even more particularly so since her presence was made essential by the adduction of additional testimony from prosecutrix under the guise of rebuttal, less than one-half hour before the motion was made.

It is acknowledged that whether or not a continuance will be granted is within the sound discretion of the Court. However, on the closing day of the trial the prosecution is allowed to put on improper rebuttal testimony (R. pp. 197-203), is granted a continuance, then (R. p. 272) the defendants-appellants are denied a motion for a reasonable continuance to secure a witness, one Mary Chang, to answer testimony impossible to anticipate and adduced that very day.

The name of Mary Chang appears all through the record and it is obvious that she possesses full knowledge of the transactions between the Liis, the prosecutrix, and herself. Under these circumstances, we respectfully submit that it was error for the Court to refuse a motion for a reasonable continuance to allow defendants-appellants to procure their major witness, Mary Chang.

SPECIFICATION OF ERROR NO. 13.

THE COURT ERRED IN PERMITTING ON REBUTTAL EVIDENCE OF OTHER CRIMES ALLEGED TO HAVE BEEN COMMITTED BY DEFENDANTS AND NOT RELATED TO THE CRIME ALLEGED IN THE INDICTMENT (R. pp. 249-267).

It is respectfully submitted that the Court erred in admitting any of the testimony of witness Lorraine Marjorie Staunton as rebuttal, or for any other reason (R. pp. 249-267).

To be admissible as rebuttal, testimony must tend to contradict an affirmative fact that defendants-appellants have attempted to prove affirmatively (Specification of Error No. 11, *supra*). There is not one fact in her entire testimony the contrary of which defendants-appellants have tried to prove affirmatively.

Further, her evidence is not properly admissible in any event as it does not tend to prove or disprove any of the facts in issue in this case.

20 *Am. Jur., Evidence*, § 302: The fundamental principle is that evidence must be relevant to the facts in issue in the case on trial and tend to prove or disprove such facts; evidence as to collateral facts is not admissible. Accordingly, as a general rule, evidence of other acts, even of a similar nature, of the party whose own act or conduct or that of his agents and employees is in question, or other similar transactions with which he has been connected, of a former course of dealing, of his conduct or that of his agents and employees on other occasions, or of his particular conduct upon a given occasion is not competent to prove the commission of a particular

act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.

V.

CONCLUSION.

It is respectfully submitted that each error relied on is sufficient in itself to entitle the appellants to have the jury's verdict set aside.

Dated, Honolulu, Hawaii,
November 5, 1951.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellants.

No. 13,005

IN THE

United States Court of Appeals
For the Ninth Circuit

MINER LII and ALICE LII,	}
VS.	
UNITED STATES OF AMERICA,	
	<i>Appellants,</i>
	<i>Appellee.</i>

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

HOWARD K. HODDICK,
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District of Hawaii,

NAT RICHARDSON, JR.,
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FILED

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No. 13,005

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MINER LII and ALICE LII,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

By indictment returned March 14, 1951, Appellants were charged with violating Section 2421, Title 18, United States Code, within the jurisdiction of the District Court of Hawaii. The District Court of Hawaii had jurisdiction of that offense. Section 3237, Title 18, United States Code provides as follows:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any

district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves. June 25, 1948, c. 645, 62 Stat. 826.

Thus it is apparent that a violation of Section 2421, Title 18, United States Code is a continuing offense. Appellants contend that the District Court of Hawaii did not have jurisdiction in view of Rule 18 of the Federal Rules of Criminal Procedure. Under the notes of the Advisory Committee on Rules, cited immediately following the statement of the rule, the following language is found:

2. Within the framework of the foregoing constitutional provisions and the provisions of the general statute, 28 U.S.C.A. former § 114, *supra*, numerous statutes have been enacted to regulate the venue of criminal proceedings, particularly in respect to continuing offenses and offenses consisting of several transactions occurring in different districts. *Armour Packing Co. v. United States*, 28 S.Ct. 428, 209 U.S. 56, 73-77, 52 L.Ed. 681; *United States v. Johnson*, 65 S.Ct. 249, 323 U.S. 273, 89 L.Ed. 236. These special venue provisions are not affected by the rule. Among these statutes are the following: U.S.C.A. Title 8: * * *

§ 401 (White Slave traffic; jurisdiction of prosecutions).

Former Section 401, Title 18 is now incorporated under Section 2421 which is the section under which these defendants stand convicted. In any event this Court has held, in *Rodd v. United States*, 165 F. (2d) 54 (C.C.A. California), that a question of venue, if not raised until appeal, comes too late, and no mention of lack of jurisdiction of the trial Court was made until this case got into the Appellate Court. The jurisdiction of this Court to review the final judgment of the District Court is sustained by Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE.

The indictment charged that on or about the 9th day of October, 1950, the defendants did knowingly, wilfully, unlawfully and feloniously procure and obtain a ticket from the Pan American World Airways to be used by one Sarah Lee Wright, in interstate commerce from San Francisco, California to the City and County of Honolulu for the purpose of prostitution, debauchery and other immoral purposes and that thereafter the said ticket was used by the said Sarah Lee Wright, in interstate commerce from San Francisco, California to the City and County of Honolulu for the said purposes of prostitution, debauchery and other immoral purposes. (R. 3.) The defendants were tried jointly and convicted.

The Government proved by Sarah Lee Wright that she first met the defendants in October, 1950 in San Francisco (R. 34), that they then propositioned her

about going to Honolulu (R. 35-36), to work as a prostitute. (R. 36.) That after several conversations with both defendants she agreed to come to Honolulu. (R. 38.) That the defendant, Alice Lii, called the Pan American World Airways and made three (3) reservations. (R. 40.) That the defendant, Miner Lii, said that he would pay her way. (R. 41.) That they left the following Monday (R. 41), and came to Honolulu; that she worked as a prostitute in the defendants' house for seven (7) weeks after arriving here. (R. 42-45.) On cross-examination her story was not shaken.

Edward George Velazques, on behalf of the plaintiff, testified that he was a senior cashier for Pan American World Airways in San Francisco (R. 97); that on October 7, 1950, two Pan American airline tickets, bearing consecutive serial numbers, were made out, one to Miner and Alice Lii and the other to Sarah Lee Wright. (R. 99.)

Frank Sampson, a merchant seaman, testified on behalf of the plaintiff that on October 7, 1950 he took the defendants, Alice and Miner Lii, together with Sarah Lee Wright and a "girl named Mary", to the airport. (R. 106.)

Defendants' counsel moved for a directed verdict of not guilty as to Miner Lii which was overruled by the Court.

ARGUMENT.

Thirteen specifications of error are alleged by appellants. These specifications will be dealt with separately.

SPECIFICATION OF ERROR NO. 1.

THE COURT DID NOT ERR IN OVERRULING DEFENDANTS' OBJECTION TO TRIAL BY A JURY PANEL IN FRONT OF WHICH THEY HAD BEEN FOUND GUILTY OF CONTEMPT, FINED, AND PLACED IN CUSTODY OF THE UNITED STATES MARSHAL.

The record shows that the defendants were "practically an hour" late in appearing in Court on the morning of trial. (R. 26.) The Court found each defendant in contempt and fined each defendant \$50.00 with the direction that the defendants be placed in the custody of the United State Marshal until the fine was paid. (R. 26.) This was before the jury was impaneled. (R. 27.) The record is silent as to whether any of the jurors ultimately chosen to serve were present in the courtroom. It is true that Mr. Soares, appellants' attorney, stated to the Court that the incident happened in the presence of the jury (R. 27), but there is no way of knowing if the jurors finally selected were in the courtroom at that time. If so, Mr. Soares could have questioned the prospective jurors as to their understanding of the incident on *voir dire* examination. In any event, before any proof at all was introduced, and before an opening statement was made by the plaintiff, the Court cautioned the jury in the following words:

Now, you are trying these defendants for just what they are indicted for in this case, and nothing else. What their conduct may have been in other affairs is of no concern to you in trying this case. You were present when the Court had been aggrieved by the failure to be here at the time set for trial and the Court found them in contempt, guilty of contempt, and punished them. That is of no consideration to you gentlemen at all. It doesn't enter into this trial of this case in any respect whatsoever. In your minds it should not. (R. 28.)

If the actions of the judge, in fining defendants, was improper in any sense (which we do not concede) any error was certainly cured by his later instructions to the jury as heretofore quoted. The law, as stated in 23 *C.J.S.* at page 339 is as follows:

If the judge makes an improper remark in the presence of the jury, it is ordinarily competent for him, in the absence of an objection, to correct it afterward by a proper instruction to the jury not to consider it, or by an instruction correcting the erroneous statement, except where the remark so prejudices the minds of the jury against accused or destroys a substantial defense, as to be ineradicable, or where the form in which the withdrawal is couched reiterates and aggravates the erroneous remark or conduct.

It was held in *Goldstein v. United States*, 63 F. (2d) 609 (1933-8 C.C.A.) that an Appellate Court should be slow to reverse a case for the alleged misconduct of the trial Court, unless it appears that the conduct was intended to disparage the defendant in

the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits.

There is certainly no showing that the Court intended or calculated that his remarks would prejudice the jury, and in any event, his later caution to the jury, after it was impaneled, would clear up any misunderstanding on their part.

SPECIFICATION OF ERROR NO. 2.

THE COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE ACTIONS OF THE PROSECUTRIX AND OF THE DEFENDANTS AFTER THEIR ARRIVAL IN HONOLULU SUBSEQUENT TO THE CRIME ALLEGED IN THE INDICTMENT.

We submit that the question of whether or not the trial Court had jurisdiction has been settled by the authorities quoted in the "Statement of Jurisdiction" in this brief. Appellants now apparently contend that any evidence showing acts of either prosecutrix or defendants after their arrival in Honolulu, is immaterial, specifically, whether or not prosecutrix engaged in prostitution at the defendants' home after her arrival in Honolulu.

We quote from *United States v. Sorrentino*, 78 Fed. Sup. 425 (1948—M.D. Pa.), affirmed 175 F. (2d) 721, *certiorari* denied 70 S.Ct. 143, 338 U.S. 868, rehearing denied 70 S.Ct. 328, 338 U.S. 896:

We admitted evidence of the conduct of Sorrentino after arrival of the victim in Buffalo. The gist or gravamen of the offense was the interstate transportation and inducing the victim to go into interstate commerce for the purpose

of prostitution. The offense is complete the moment the victim has been transported across state lines with the immoral purpose or intent in the minds of the persons responsible. *Mortensen v. United States*, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331; *Wilson v. United States*, *Neff v. United States*, *supra*. In considering the evidence however and in reaching their conclusion the jury were entitled to consider what the victim and Sorrentino did after she arrived at her destination, as well as the character of the house to which the victim had been brought as tending to prove the intent and purpose of defendant in bringing her there. See *Pine v. United States*, 5 Cir., 1943, 135 F. 2d 353, 357; *Kelly v. United States*, 9 Cir., 1924, 297 F. 212, 213; *Wilson v. United States*, *Tedesco v. United States*, 118 F. 2d 737 (9 C.C.A.).

It will be noted that one of the cases cited as upholding this theory is a case decided by this Court in 1941, the *Tedesco* case. When the *Sorrentino* case reached the Third Circuit Court of Appeals, 175 F. (2d) 721 (which affirmed the lower Court), apparently the question of introduction of evidence concerning acts subsequent to the offense was not strongly relied upon since that Court did not comment upon the question other than to say that they have carefully considered other contentions raised by appellant and "find them so wholly lacking in merit as to require no detailed discussion".

The same question has been also passed upon by this Court in the case of *Kelly v. United States*, 297 Fed. 212. This was a white slave case involving

the transportation of two women from Seattle, Washington to Anchorage, Alaska for the purposes of prostitution. The Court held as follows:

* * * The burden was upon the government to prove that the two women were transported from the state of Washington to the territory of Alaska for the purpose of prostitution or debauchery, or for some other immoral purpose, and testimony tending to show the acts and conduct of the parties concerned after the arrival of the women at Anchorage was clearly competent to that end, and, as already stated, if competent, the testimony was ample to support the verdict. *Athanasaw v. United States*, 227 U.S. 326, 33 Sup. Ct. 285, 57 L.Ed. 528, Ann Cas. 1913 E, 911; *Suslak v. United States*, 213 Fed. 913, 130 C.C.A. 391; *Beyer v. United States*, 251 Fed. 39, 163 C.C.A. 289; *Blackstock v. United States*, (C.C.A.) 261 Fed. 150; *Carey v. United States*, (C.C.A.) 265 Fed. 515; *Elrod v. United States*, (C.C.A.) 266 Fed. 55.

It is significant to note that appellants' brief cites no cases holding contrary to the aforementioned authorities. The case of *Cholakos v. United States*, 2 F. (2d) 447, does not pass on the question involved here at all. It merely holds that where a person is charged with transporting a woman in interstate commerce for the purpose of prostitution, so long as the *intent* to so transport her is present, it is immaterial if the actual prostitution later occurs.

SPECIFICATION OF ERROR NO. 3.

THE COURT DID NOT ERR IN PERMITTING, OVER OBJECTION, LEADING QUESTIONS TO THE PREJUDICE OF THE APPELLANTS' RIGHT TO A FAIR TRIAL.

The appellants make the general objection that on direct examination, Sarah Lee Wright, the prosecuting witness, was asked leading questions. Appellants cite four instances of what they contend are leading questions. In the first instance (R. 37) the question was interrupted by appellants' counsel before it was completed. The question in its final form was in the following words:

“Well, now, can you tell from there on what arrangement was made, if any?”

The second instance (R. 40) the question was:

“Could you overhear the conversation, Miss Wright?”

The third instance (R. 43) was:

“Was that one of the conditions that was attached to your coming out here?”

The last question objected to (R. 203) was:

“Could you leave there by yourself?”

We submit that these questions, considering the context within which they were asked, are not leading, or at any rate are certainly not leading to the extent of being prejudicial to the defendants. The authority cited by appellants admits that the allowance of leading questions on direct examination is within the discretion of the trial judge. It is evident that the judge, by overruling objections to the fore-

going questions certainly did not consider them leading or prejudicial. The law on this subject, as stated in 70 C.J. Section 678, is as follows:

The term "leading," as relative to a leading question, is a relative and not an absolute term. In general a question is leading when it is so framed as to suggest to the witness the answer which is desired of him, code provisions sometimes so providing; e converso a question not suggesting the desired answer is not leading, where it inquires only into a single fact. Merely mentioning or directing attention of the witness to the matter as to which information is desired, or the nature thereof, does not render the question leading as suggesting the answer, and this is true of a case where something of detail is included in the question in order to bring the matter to the attention of the witness.

It is within the discretion of the trial court to determine whether questions on examination are leading and suggestive.

SPECIFICATION OF ERROR NO. 5.

THE COURT DID NOT ERR IN PERMITTING THE PROSECUTRIX TO REMAIN IN THE COURT WHILE APPELLANTS MADE AN OFFER OF PROOF TO BE ELICITED ON CROSS-EXAMINATION OF THE PROSECUTRIX.

Again we have an alleged error assigned by appellants in which the appellants' authority cited in support of the alleged error admits that the action of the trial Court is within its discretion (23 *C.J.S.* Section 1011).

The trial court has authority to exempt particular witnesses from the operation of the rule or order for exclusion or sequestration. The question as to what witnesses may be exempted is largely a matter within the discretion of the court, and, even after the granting of the rule or order excluding or sequestering the witnesses, it is within the discretion of the trial court to permit some of them to remain in the court room and afterward to testify if the circumstances require it. * * *

The court may, in the exercise of a sound discretion, permit the prosecuting witness or the person aggrieved or injured to remain in the court room, but, according to some cases, the court should impose as a condition that the state, if it desires to use the prosecutor as a witness, should examine him first. * * *

It has been expressly held on this question that permitting a witness to be present from time to time as offers of testimony implicating him were made was proper notwithstanding an order excluding witnesses. *State v. Kneeskern*, 210 N.W. 465, 203 Iowa, 929.

SPECIFICATION OF ERROR NO. 6.

THE COURT DID NOT LIMIT THE SCOPE AND EXTENT OF THE CROSS-EXAMINATION OF THE PROSECUTRIX OR UNFAIRLY AND UNFAVORABLY AND PREJUDICIALLY CHARACTERIZE THE CROSS-EXAMINATION.

A complaint is made as to certain remarks of the Court with reference to cross-examination of the prosecutrix by appellants' counsel. The remarks of

the Court complained of are set out in appellants' Specification of Error No. 6.

In *Goldstein v. United States*, 63 F. (2d) 609, the trial Court made, among others, the following remarks to defense counsel:

"It would be hearsay. You know it is not competent. You must stop that. I am not going to stand for it much longer."

* * * * *

"That is twice, now, that I have passed on similar matters. I hope I do not have to pass on them a third time."

* * * * *

"You cannot take witnesses and put a ring in their noses and lead them around like pet bears."

"It is not only hearsay * * * but worse than hearsay, and it is getting inferentially the testimony by men who are scattered all over the country, which you cannot do. I am quite sure you knew it could not be done."

The Eighth Circuit Court of Appeals, in passing on these remarks held as follows:

It is not always possible during the trial of a hotly contested case for a judge, however impartial he may be, to maintain in the courtroom that atmosphere of complete judicial calm which is so much to be desired. We must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits. While counsel owe to the court, because of the position which he occupies, the utmost deference and respect, and while the court owes to them an equal obligation of courtesy and patience and considera-

tion, nevertheless sharp differences of opinion do arise in the heat of trial and things are said which were better left unsaid. Such incidents are often regarded as trivial during the trial of a case and are quickly lost sight of, but, when set forth in the record and emphasized by counsel on appeal, they take on an importance which they never actually possessed. It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy. Critical remarks of the court frequently cut both ways, if they cut at all. Colloquies between counsel and colloquies between the court and counsel as to the rules of evidence are not ordinarily regarded by a jury as serious matters or of much concern to them. * * *

We are quoting in the appendix another excerpt from *Goldstein v. United States*, supra, which sets out other remarks made by trial Courts which have been held to be not prejudicial. All the remarks cited in the appendix were more extreme than the ones uttered by the trial Court in this case, which, we submit, were not prejudicial to the defendants.

The cross-examination of Sara Lee Wright, the prosecutrix, was not limited to even the slightest extent.

Appellants' objection that the cross-examination was so limited is restated in Specification of Error No. 7 and will be dealt with there.

SPECIFICATION OF ERROR NO. 7.

THE COURT DID NOT LIMIT APPELLANTS' CROSS-EXAMINATION OF A GOVERNMENT WITNESS TO FULLY INQUIRE INTO THE CHARACTER OF CRIMINAL ACTIVITIES OF SAID WITNESS.

As far as the remarks of the Court are concerned they have been dealt with in the preceding specification of error. Appellants now contend that they were limited in their cross-examination by reason of the fact that the Court said, "I don't feel that it would be proper to give you any more than ten minutes additional time to finish your cross-examination." In point of fact, appellants' cross-examination of the prosecuting witness was not limited in the slightest particular as appellants' counsel was allowed full latitude and scope in completing his cross-examination. The printed record shows that the cross-examination of the prosecuting witness covers eleven printed pages following the remarks of the Court. Upon the completion of the cross-examination appellants' counsel stated, "No further questions." If appellants' counsel felt that he had been limited in any extent on cross-examination, he could have re-stated to the Court his desire to continue. The Court, of course, made no further references to the subject after the first one to the effect that he did not think it would be proper to continue for more than ten minutes on cross-examination. Nowhere in the record does it appear that the trial Court directed appellants' counsel to conclude his examination on any subject.

Appellants have not shown that they have been prejudiced by any ruling of the Court with reference

to cross-examination. This Court has held in *Allred v. United States*, 146 F. (2d) 193 (1944) that unless such prejudicial conduct is shown, the judgment will not be reversed.

SPECIFICATION OF ERROR NO. 8.

THE COURT DID NOT ERR IN OVERRULING APPELLANTS' MOTION FOR DIRECTED VERDICT AS TO DEFENDANT, MINER LII.

At the conclusion of the plaintiff's case a motion for a directed verdict of acquittal was made as to only one defendant, Miner Lii, which motion was overruled by the Court.

On review from an order denying a motion for a directed verdict of acquittal or for a judgment as of non-suit or overruling a demurrer to the evidence, the appellate court will not weigh the evidence, and will not disturb the ruling of the trial court if there was sufficient evidence to require the submission of the cause to jury. 24 C.J.S. 1880.

We submit that the following evidence was adduced against the defendant, Miner Lii:

1. Sarah Lee Wright met Miner Lii and his wife in San Francisco in October of 1950. (R. 34.)
2. She was introduced to Miner Lii by Frank Sampson. (R. 88.)
3. She was told that he was looking for girls to come to Honolulu. (R. 89.)
4. She talked to both defendants in a car. (R. 35.)

5. Both defendants propositioned her to come to Honolulu. (R. 35.)

6. They asked her to work here as a prostitute. (R. 36.)

7. They described to her the conditions here, told her they had a house over here where she could work, told her that she would stay there and eat there and that they would take half the money, and told her what the price was. (R. 36 and 90.)

8. They again asked if Sarah Lee Wright would come to Honolulu and both of them knew that she was coming and both of them were present at this conversation. (R. 38.)

9. Defendant, Miner Lii, said that he would pay her way and did. (R. 41.)

10. She came to Honolulu with both defendants, worked as a prostitute in defendants' house, and half the money went to them. (R. 42-43.)

The foregoing evidence was viewed by the Court as sufficient proof to require submission of the cause to the jury. The jury considered this evidence as sufficient proof to convict the defendant, Miner Lii. Under the circumstances, certainly it could not be said that a motion for a directed verdict of acquittal should have been granted.

SPECIFICATION OF ERROR NO. 9.

THE COURT DID NOT ERR IN REFUSING APPELLANTS' OFFER OF PROOF AS TO CORROBORATING TESTIMONY OF APPELLANTS' WITNESS.

The appellants offered a witness, one Harold John Lewis, who testified that he had seen Sarah Lee Wright on the Island of Kauai, which was denied by Sarah Lee Wright. (R. 313.) Appellants then offered the proof that the witness, Lewis, had talked to some man named Cluny in Honolulu on a later date and that Cluny had known Sarah Lee Wright and that Cluny had produced photographs of the said Sarah Lee Wright in an effort to show Lewis that the girl Cluny knew was the same girl. Appellants offered to prove the conversations between Cluny and the witness Lewis. Naturally this offer of proof was denied, as a mere cursory examination of the offer (R. 139), shows it to be based on nothing other than hearsay. We see no reason for elaborating on this specification of error as the offer of proof shown in the record speaks for itself, and shows clearly that the Court was justified in refusing to admit that proof.

SPECIFICATION OF ERROR NO. 10.

THE COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF DEFENDANT ALICE LII ON MATTERS NOT REFERRED TO IN HER DIRECT TESTIMONY.

The question is too well settled to admit of argument that a wide scope is allowed on cross-examination. *Wharton's Criminal Evidence*, Vol. 3 at page 2165 states the rule to be as follows:

Opportunity should be allowed for a thorough and sifting cross-examination which should be neither unduly restricted nor abridged. The denial of a fair latitude in cross-examination is a denial of a substantial right and a withdrawal of one of the safeguards essential to a fair trial. It is, therefore, generally held that a wide range of cross-examination is permissible and that wide or great latitude is allowed, especially in capital cases. The court should never interpose except where there is a manifest abuse of that right, but should extend rather than restrict the right of cross-examination as to facts in issue or relevant to the issue.

Further, the extent of the cross-examination is within the control of the trial judge. 70 *C.J.S.* at page 682:

The scope and extent of the cross-examination of a witness, including own witness who has proved hostile, and method and manner in which it may be conducted, are matters resting largely in the discretion of trial court, whose rulings will not be disturbed unless some abuse of discretion is shown, or the right to cross-examine denied, but in the absence of a contrary showing, the presumption is that there was no abuse of discretion, in permitting or excluding the cross-examination, nor can such abuse be predicated on a ruling from which no injury has resulted. * * *

The questions asked the defendant, Alice Lii, on cross-examination, were clearly within the scope of cross-examination and properly admitted by the trial judge. With reference to the ownership of certain

automobile, it appears that the defendant, Alice Lii, had not worked for four years and her husband had not worked for ten years, and surely it should be of some probative value to the jury to know the conditions under which the defendants live. All questions complained of in this Specification of Error, No. 10, were clearly within the scope of cross-examination as allowed by the Court.

SPECIFICATION OF ERROR NO. 11.

THE COURT DID NOT PERMIT IMPROPER QUESTIONS OF WITNESSES CALLED ON REBUTTAL.

It is clear that subject to the discretion of the trial Court either side has the right in a criminal prosecution to introduce evidence in rebuttal to that introduced against him by the other side. 23 *C.J.S.* at page 450:

* * * Hence, while it is discretionary with the prosecution whether it will introduce any evidence in rebuttal, if it decides so to do it may introduce in rebuttal any competent evidence which explains or is a direct reply to or a contradiction of material evidence introduced by accused, or which is brought out on his cross-examination, or on cross-examination of his accomplice, or other defense witnesses, or even state witnesses, and accused may, and should be permitted to, introduce competent evidence in rebuttal of that introduced by the prosecution.

Alice Lii, on direct examination, specifically denied that Sarah Lee Wright ever practiced prostitution in

her home or that she received any money from the said prostitution. She denied that the matter of prostitution was ever discussed. (R. 161-166.) Therefore, it was perfectly proper for the Court to allow the prosecution to prove by the witness, Sarah Lee Wright, exactly what took place in the Liis' home while she was there.

Alice Lii denied on direct examination that she bought the car referred to in the evidence. Therefore, it was perfectly proper for the Court to allow the prosecution to prove by the car salesman that he received the cashiers' checks from Alice Lii.

SPECIFICATION OF ERROR NO. 12.

THE COURT DID NOT ERR IN PERMITTING A RECESS AT THE REQUEST OF THE PROSECUTION AND IN REFUSING A CONTINUANCE AT THE REQUEST OF THE DEFENSE IN ORDER TO SECURE A WITNESS.

The prosecution requested a recess in order to secure three witnesses who were under subpoena. The Court recessed at 10:23 A.M. until 1:30 P.M. on the same day. (R. 231.) This is referred to in appellants' brief as a continuance, but it is perfectly apparent that it is a recess. Appellants then requested a continuance for a week to secure a witness who was not under subpoena (R. 229 and 272), but whom the appellants could have subpoenaed before the trial, as appellants' counsel, in his opening argument, stated that he expected to have that witness present. (R. 32.) There is no showing that the witness' testimony would be material. There is no showing that appellants'

counsel was not guilty of neglect or *laches* in securing a subpoena for the witness. There is no showing that this witness could be procured within a week. Certainly there is no showing that there was an abuse of discretion on the part of the trial Court in refusing the continuance.

SPECIFICATION OF ERROR NO. 13.

THE COURT DID NOT ERR IN PERMITTING THE REBUTTAL
EVIDENCE OF THE WITNESS LORAIN STANTON.

Alice Lii, on cross-examination, stated that the name Loraine Staunton sounded familiar to her but that she did not remember that Loraine Staunton ever stayed at her house. (R. 172.) Later in her testimony she said, with reference to Loraine Staunton, "Well, I know no one there by that name was staying at my house." (R. 185.) Alice Lii stated that no girls had ever stayed at her house except Sarah Lee Wright and Mary Chang. (R. 171.) In view of that testimony it clearly is competent to prove that the said Loraine Staunton, whom Alice Lii "couldn't remember", stayed at the Liis' house and practiced prostitution. This evidence would not have been competent as evidence in chief but to impeach Alice Lii's credibility, it was clearly competent and extremely material.

CONCLUSION.

We respectfully submit that there are no errors charged by appellants upon which this verdict should be set aside.

Dated: Honolulu, T.H., this 14th day of January, 1952.

HOWARD K. HODDICK,

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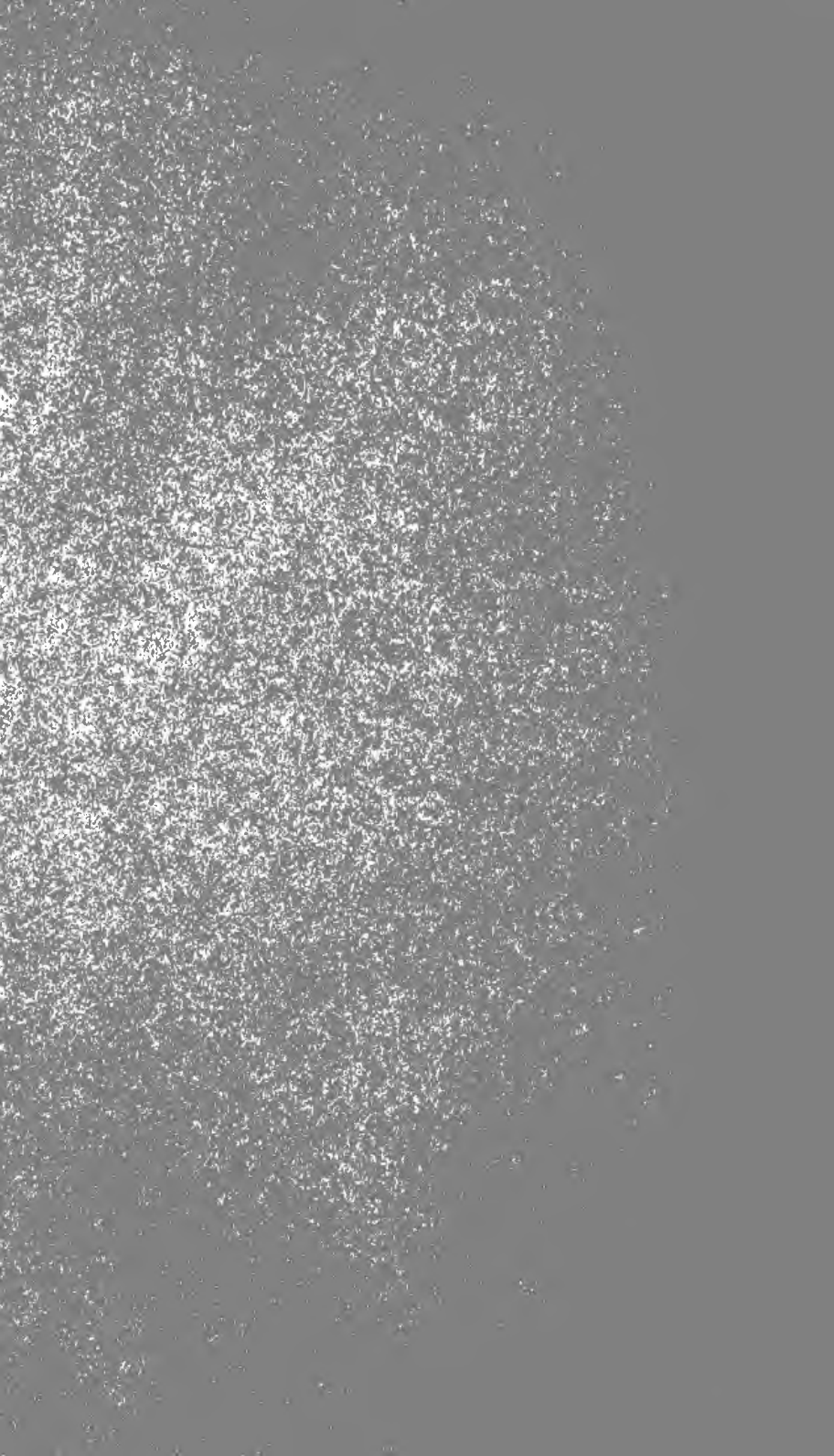
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(Appendix Follows.)



Appendix.



Appendix

GOLDSTEIN v. UNITED STATES, 63 F. (2d) 609.

Gridley v. United States, (C.C.A. 6), 44 F. (2d) 716, 736.

Myers v. Town of Guntersville, 21 Ala. App. 559, 110 So. 52, where the remark was:

“You have asked that enough; you just want to drag them around from first one thing to another.”

People v. Connors, 77 Cal. App. 438, 246 P. 1072, 1079, where the Court had said:

“Make your object; don’t take up so much time in statements.”

People v. Knocke, 94 Cal. App. 55, 270 P. 468, 470, where the remarks complained of were:

“I am surprised that any one who has gotten by the Bar Association examination should raise that question”; and

“Now, wait. If you cannot behave yourself in this court, you better go and practice in the police court. Make your motion in a quiet manner”.

Of these remarks, the Appellate Court said:

“Under the strain of a trial and the repetition of an offense, even trial judges are not always able to choose their diction with the nicety of a Field or Marshall”.

People v. Lockhard, 242 Mich. 491, 219 N.W. 724, 725, in which the objectionable remark was:

“I am glad to have you make objections, if there is some good sense back of them, if they are proper objections. You are a lawyer; you know what impeachment is; you ought to know it by this time”.

In *Hein v. Mildebrandt*, 134 Wis. 582, 115 N.W. 121, 124, the Supreme Court of Wisconsin said:

“The language complained of was an admonition coming from the court to the effect that after the court had ruled twice with reference to a certain question it was unprofessional and uncourteous for appellant’s counsel to persist in putting the question for the purpose of procuring an answer considered improper by the court, and that counsel had the record covering the point completely, and that he must not offend in that way again”.

No. 13,005

IN THE

United States Court of Appeals
For the Ninth Circuit

MINER LII and ALICE LII,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Territory of Hawaii.

APPELLANTS' REPLY BRIEF.

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FILED

FEB 29 1952

PAUL P. O'BRIEN
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No. 13,005

IN THE

**United States Court of Appeals
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MINER LII and ALICE LII,	} <i>Appellants,</i>
VS.	
UNITED STATES OF AMERICA,	
	} <i>Appellee.</i>

**On Appeal from the United States District Court
for the Territory of Hawaii.**

APPELLANTS' REPLY BRIEF.

STATEMENT OF JURISDICTION.

The statement of jurisdiction in Appellee's brief not only fails to refute Appellants' claim of lack of jurisdiction in the trial Court, but fails to show that that Court had jurisdiction.

In its attempt to show jurisdiction Appellee says that "Section 2421 is the section under which these defendants stand convicted" (Appellee's Brief, p. 3), and that "a violation of Section 2421, Title 18 United States Code is a continuing offense" (Appellee's Brief, p. 2). The defendants were not indicted, nor were they, nor could they have been convicted of all the offenses described in Section 2421 some of which may

well be "continuing offenses". The indictment is in only one count and charges but one offense, namely: that the defendants "did knowingly, wilfully, unlawfully and feloniously procure and obtain a ticket from the office of Pan-American World Airways at 222 Stockton Street, San Francisco, California to be used by a woman, namely, Sara Wright, in interstate commerce in going from San Francisco, California, to the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court for the purpose of prostitution, debauchery and other immoral purposes".

Section 2421 sets up at least two separate and distinct crimes each complete in itself.

(1) The act of transporting; and (2) procuring a ticket to be used in going to any place for purposes of prostitution or debauchery.

It is with the commission of the second of these crimes that defendants are charged.

Contrary to Appellee's assertion (Appellee's Brief, p. 3), this Court did not hold in *Rodd v. United States*, 165 F. (2d) 54, "that a question of venue, if not raised until appeal, comes too late". The question involved in that case was a defective indictment, consisting of its failure to allege venue. There was involved no question of the facts failing to establish jurisdiction.

The criminal act complained of was shown by the evidence to have been completed in a city within the jurisdiction of the trial Court. In the case at bar the act complained of and as proved was completed in a city not within the jurisdiction of the trial Court.

A distinction is to be drawn between the failure of the indictment to allege venue (as in *Rodd v. United States*, supra) and clear proof showing that the trial Court was without jurisdiction. The chief distinction being that a question of jurisdiction may be raised at any time, even by the Appellate Court in its own motion.

BRIEF OF THE ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN OVERRULING DEFENDANTS' OBJECTION TO TRIAL BY THAT JURY IN FRONT OF WHICH THEY HAD BEEN FOUND GUILTY OF CONTEMPT, FINED AND PLACED IN CUSTODY OF THE UNITED STATES MARSHAL.

Appellee's suggestion that the jurors finally selected to try the case were not in the courtroom at the time of defendants being sentenced and taken into custody is a bit far-fetched. Notwithstanding Appellee's assertion that "there is no way of knowing if the jurors finally selected were in the courtroom at that time" (Appellee's Brief, p. 5), the Appellee actually pointed the way on the very next page of its brief wherein is set forth an express finding by the trial judge that they were.

The record beginning on page 27 shows that the jury which was impaneled and sworn was addressed by the presiding judge who said, among other things:

You were present when the Court had been aggrieved by their (defendants') failure to be here at the time set for trial and the Court found them in contempt, guilty of contempt, and punished them. (R. p. 28.)

Though Appellee asserts (Appellee's Brief, p. 7), "There is certainly no showing that the Court intended or calculated that his remarks would prejudice the jury," the use by the judge of the word "aggrieved" in the passage cited above is significant of his personal feeling in the matter.

SPECIFICATION OF ERROR NO. 2.

THE COURT ERRED IN PERMITTING EVIDENCE OF THE ACTION OF THE PROSECUTRIX AND OF THE DEFENDANTS AFTER THEIR ARRIVAL IN HONOLULU SUBSEQUENT TO THE COMMISSION OF THE CRIME ALLEGED IN THE INDICTMENT, THE COMMISSION OF SAID CRIME HAVING BEEN COMPLETED IN SAN FRANCISCO AND BEFORE THEIR ARRIVAL IN HONOLULU.

The cases cited by Appellee are not helpful in deciding the question raised by specified error No. 2 for the reason that they relate to the charge of *transporting*, the first of the two crimes included in Section 2421, a continuing offense, whereas the only crime for which defendants were on trial was the second crime described in Section 2421: a crime complete in itself and not dependent on whether the purpose for which the tickets were procured and obtained was effectuated. Had the evidence shown that the defendants merely procured and obtained the tickets under the circumstances testified to as occurring in San Francisco, and had the evidence shown nothing else,—in other words, had the evidence objected to not been admitted,—the commission of the crime would have been established completely. The evidence received over defendants' objection here complained of could serve no need-

ful purpose other than to create a harmful prejudice against the defendants in the minds of the jurors.

SPECIFICATION OF ERROR NO. 5

THE COURT ERRED IN PERMITTING THE PROSECUTRIX TO REMAIN IN THE COURT, ALTHOUGH THE JURY WAS EXCLUDED, (WHILE) DEFENDANTS-APPELLANTS MADE AN OFFER OF PROOF TO BE ELICITED ON CROSS-EXAMINATION OF THE PROSECUTRIX.

The prejudice to the defendants arising out of the Court's permitting the prosecutrix to remain while defense counsel indicated what he expected to elicit from her arose out of her character and her attitude on the witness stand, which attitude was shown by her interruption of defense counsel while he was making the offer of proof, calling forth from the judge a stern reproach.

The Court. Well, you keep out of it. You will get your chance later. (R. p. 54.)

SPECIFICATION OF ERRORS NOS. 6 AND 7.

THE COURT ERRED IN UNDULY LIMITING THE SCOPE AND EXTENT OF THE CROSS-EXAMINATION OF THE PROSECUTRIX AND IN UNFAIRLY AND UNFAVORABLY AND PREJUDICIALLY CHARACTERIZING THE CROSS-EXAMINATION.

THE COURT ERRED IN REFUSING TO PERMIT DEFENDANTS-APPELLANTS ON CROSS-EXAMINATION OF A GOVERNMENT WITNESS TO FULLY INQUIRE INTO THE CHARACTER AND CRIMINAL ACTIVITIES OF SAID WITNESS.

Appellee answers Appellants' argument in support of their claim of error under these two specifications by setting out the remarks of the Court complained

of in *Goldstein v. United States*, 63 F. (2d) 609 (Appellee's Brief, p. 13) and in a series of cases cited in the appendix to the brief.

In each case cited the remarks complained of were drawn forth by the clear misconduct of defense counsel, such as attempting to bring in hearsay and not evidence; repeatedly asking questions which the Court had clearly ruled improper; consuming time in statements, and not properly making objections, and improper deportment on the part of defense counsel.

In the case at bar no criticism of counsel's conduct was offered by the Court. Notwithstanding which, by insisting that counsel confine himself in cross-examining a witness to matters brought out on direct, the Court intimated that cross-examination of the witness as to her morals and bad character for the purpose of attacking her credibility was "so-called cross-examination", that is, implying doubt as to its correctness or propriety; not genuine, fake; in short, "phoney". This could not but have an unfavorable effect on the jury.

Further in view of the witness's evasiveness, her manner of testifying which aggravated the Court and the United States attorney alike to the extent that both from time to time felt called upon to admonish her, an arbitrary time-limit of ten minutes such as the Court fixed, was prejudicial.

Appellee's theory seems to be that for error such as here complained of to be prejudicial, defendants have the burden of establishing that the verdict would of necessity have been favorable but for the prejudi-

cial conduct complained of, and cites *Allred v. United States*, 146 F. (2d) 193, in support of that theory.

Allred v. United States, supra, does not support any such broad statement of law as Appellee attributes to it. This Court merely held in the *Allred* case that mere refusal of the trial Court to permit a witness to "snip the lining of a coat (already in evidence) a little in the back", "to see if the witness could identify her work", even though it be assumed to be error, was not, of itself such error as to require a reversal.

SPECIFICATION OF ERROR NO. 8.

THE COURT ERRED IN OVERRULING DEFENDANTS-APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO DEFENDANT MINER LII.

Appellee lists 10 places in the Record setting forth what Appellee says was "evidence adduced against the defendant Miner Lii". Except in one significant instance which will be hereinafter pointed out, the list contains a correct resume of the record appearing on the pages referred to. However, with the exception referred to in the last preceding sentence, none of it is evidence of the commission of the crime with which the defendant Miner Lii stood charged (whatever may be said as to its being evidence against the defendant Alice). We must bear in mind that the charge against the defendant Miner Lii was not "white slavery" generally but was specifically that he violated a single provision of the section, namely: knowingly procuring a ticket to be used in going to any place for purposes of prostitution and debauchery.

In number 9 in Appellee's list of items of evidence, Appellee says the Record on page 41 discloses that defendant, Miner Lii, not only promised the prosecuting witness that he would pay her way and that he did, in fact, pay her way. There is nothing recorded on that, or any other page of the Record, that Miner Lii paid "her way". Nor is there a scintilla of evidence to the effect that Miner Lii procured or obtained a ticket for Sara Lee Wright.

SPECIFICATION OF ERROR NO. 9.

THE COURT ERRED IN NOT PERMITTING DEFENDANTS-APPELLANTS TO ELICIT CORROBORATION OF TESTIMONY CONTRADICTING TESTIMONY THERETOFORE GIVEN BY PROSECUTRIX.

Appellee contends that the error here complained of is not in fact error for the reason that the offer of proof was "based on nothing other than hearsay". The Record does not bear out this statement. On the contrary, the offer contained the express statement that the corroboration sought to be made would be made without the use of hearsay.

The credibility of the prosecuting witness was a vital issue in the case. Here credibility was subject to attack both because of her low morals and her denials of facts that tended to show that she was a confirmed prostitute. The witness Lewis was called for that purpose. An attempt to cast doubt on his testimony was made by the cross-examiner. The corroborating evidence sought would have tended to remove that doubt.

CONCLUSION.

The foregoing is strictly in *reply* to Appellee's brief. In making this reply, Appellants have attempted to refrain from reiterating argument offered in their opening brief. For that reason some of the specifications of error have not been adverted to. They have not been abandoned.

Dated, Honolulu, Hawaii,
February 27, 1952.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellants.



No. 13006

United States
Court of Appeals
for the Ninth Circuit.

Estate of RALPH R. HUESMAN, Deceased,
NURMA W. HUESMAN, FRED B. HUES-
MAN and THE FARMERS & MERCHANTS
NATIONAL BANK OF LOS ANGELES,
Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

SEP 26 1951

No. 13006

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

THOMAS R. DEMPSEY, ESQ.,

H. B. THOMPSON, ESQ.

For Respondent:

ROBERT H. KINDERMAN, ESQ.,

Special Attorney,

Bureau of Internal Revenue, for

CHARLES C. OLIPHANT, ESQ.,

Chief Counsel,

Bureau of Internal Revenue.

In The Tax Court of the United States

Docket No. 20164

Estate of RALPH R. HUESMAN, Deceased;
NURMA W. HUESMAN, FRED B. HUES-
MAN, and THE FARMERS & MERCHANTS
NATIONAL BANK OF LOS ANGELES,
Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1948

Sept. 2—Petition received and filed. Taxpayer noti-
fied. Fee paid.

Sept. 2—Copy of petition served on General Coun-
sel.

Sept. 28—Answer filed by General Counsel.

Sept. 28—Request for hearing in Los Angeles, Calif.,
filed by General Counsel.

Sept. 30—Notice issued placing proceeding on Los
Angeles calendar. Service of answer and
request made.

1950

Jan. 13—Hearing set March 20, 1950, Los Angeles,
Calif.

Mar. 20—Hearing had before Judge Arnold Rice,
on merits. Stipulation of facts filed at
hearing. Entry of appearance of H. B.
Thompson filed. Briefs due June 1, 1950.
Replies due June 26, 1950.

1950

May 17—Transcript of hearing 3/20/50 filed.

May 29—Brief filed by taxpayer. 6/2/50 Copy served.

June 1—Brief filed by General Counsel.

June 7—Motion for leave to file attached amended petition, amended petition lodged, filed by taxpayer.

June 7—Motion for leave to file attached amended petition, granted, amended petition filed.

June 8—Copy of motion and amended petition served on General Counsel.

July 5—Motion for leave to file the attached reply brief, brief lodged, filed by taxpayer. Granted. 7/10/50 Served.

1951

Jan. 17—Stipulation re exhibit I filed.

Mar. 29—Opinion rendered, Rice, J. Decision will be entered for the respondent. Copy served.

Mar. 30—Decision entered, Rice, J., Div. 12.

June 4—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by taxpayer with proof of service thereon.

June 18—Notice of filing petition for review with service thereon filed by taxpayer.

July 5—Designation of record filed by taxpayer with service thereon.

The Tax Court of the United States

Docket No. 20164

Estate of RALPH R. HUESMAN, Deceased;
NURMA W. HUESMAN, FRED B. HUES-
MAN, and THE FARMERS & MERCHANTS
NATIONAL BANK OF LOS ANGELES,
Executors,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols: LA:IT:90D:LHP, postmarked August 3, 1948), and as a basis of this proceeding alleges as follows:

(1) The petitioners, Nurma W. Huesman, Fred B. Huesman, and The Farmers & Merchant's National Bank of Los Angeles, are the duly appointed and acting executors of the Estate of Ralph R. Huesman, deceased. The return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California, Los Angeles, California.

(2) The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on August 3, 1948.

(3) The taxes in controversy are income taxes for the period May 3, 1944, to April 30, 1945. The deficiency asserted is \$57,923.50.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing as a deduction for amounts distributed under section 162(a) the sum of \$80,517.

(b) The Commissioner erred in disallowing as a deduction for amounts distributed under section 162(b) the sum of \$80,517.

(c) The Commissioner erred in disallowing as a deduction for amounts distributed under section 162(c) the sum of \$80,517.

(5) The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) On May 3, 1944, Ralph R. Huesman died testate. At the time of his death he was President of Desmond's, a California corporation, conducting a merchandising business in that state. There was due and owing to him at that time, as compensation for services rendered in that office, the sum of \$80,517.

(b) By the terms of his will the testator made certain specific provisions for his wife and thereafter provided that all of the rest, residue, and remainder of the property in his estate be distributed to testamentary trustees upon five separate trusts. The pertinent provision of the will herein material is as follow:

(c) Loyola University of Los Angeles is a California corporation which at all times herein material qualified as a religious and educational corporation organized and operated exclusively for religious and educational purposes within the meaning of section 23(o) (2) of the Internal Revenue Code. The Regents' Fund of Loyola University of Los Angeles is a building fund constituting an asset of the corporation.

(d) On or about April 10, 1945, the executors of the Estate of Ralph R. Huesman, deceased, in that capacity and in their capacity as testamentary trustees, petitioned the Superior Court for the State of California in and for the County of Los Angeles, as the court exercising probate jurisdiction over said estate, for instructions and for an order of partial distribution. On April 30, 1945, said court entered its order and decree of partial distribution providing as follows:

* * *

(e) On April 30, 1945, said court also entered its order instructing testamentary trustees to make partial distribution, which order provided as follows:

* * *

(f) Thereafter on April 30, 1945, Desmond's paid to the executors of the Estate of Ralph R. Huesman, deceased, the sum of \$80,517 specifically as compensation or bonus for services rendered by the decedent to said corporation prior to his death; and on the same day the executors, pursuant to the

order entered by the Superior Court, paid to the testamentary trustees of the trust established by the decedent said sum of \$80,517; and on the same day the trustees of said testamentary trust, pursuant to the order entered by the Superior Court, paid to Loyola University of Los Angeles, Regents' Fund, said sum of \$80,517. At the time of receipt of said sum by the testamentary trustees and at the time of payment thereof by them, said sum of \$80,517 constituted the only asset of the trust estate.

(g) Thereafter and within the time provided by law the petitioners filed with the Collector of Internal Revenue for the Sixth District of California, a fiduciary income tax return for the Estate of Ralph R. Huesman, deceased, on Form 1041 for the fiscal period May 3, 1944, to April 30, 1945. Said return reported a gross income of \$131,140.13, deductions of \$87,828.22 and "amounts distributable to beneficiaries" listed on Schedule A of said return of \$80,517, leaving a net taxable income of \$7,311.22 and a tax liability of \$1,807.71, which was duly paid. Included within the gross income was the sum of \$80,517 received by the decedent's estate from Desmond's specifically as compensation or bonus for services rendered by the decedent prior to his death.

(h) At all times herein material petitioner has kept its books on a cash receipts and disbursements basis.

Wherefore, the petitioner prays that this court may hear the proceeding and determine that there

is no deficiency due from the petitioner for the period May 3, 1944, to April 30, 1945.

/s/ THOMAS R. DEMPSEY,
Counsel for Petitioner.

State of California,
County of Los Angeles—ss.

Fred B. Huesman and Nurma W. Huesman, being first duly sworn, depose and say: That they are respectively the duly qualified and acting executor and executrix of the Estate of Ralph R. Huesman, deceased, taxpayer named in the foregoing Petition and authorized to verify the same; that they have read the said Petition and know the contents thereof and that the same is true of their own knowledge except the matters which are therein stated to be upon information and belief and that as to these matters they believe it to be true.

/s/ FRED B. HUESMAN,
/s/ NURMA W. HUESMAN.

Subscribed and sworn to before me this 31st day of August, 1948.

[Seal] /s/ ARTHUR ROOT,
Notary Public in and for
Said County and State.

My Commission Expires Jan. 29, 1951.

State of California,
County of Los Angeles—ss.

R. C. Lemmon, being first duly sworn, deposes and says: That he is the Vice President of the Farmers and Merchants National Bank of Los Angeles, a corporation, duly qualified and acting as executor of the Estate of Ralph R. Huesman, deceased, taxpayer named in the foregoing Petition, and that he is authorized to make this verification for and on behalf of said corporation; that he has read the said Petition and knows the contents thereof, and that the same is true of his own knowledge, except the matters which are therein stated to be upon information and belief, and that as to those matters he believes it to be true.

/s/ R. C. LEMMON.

Subscribed and sworn to before me this 24th day of August, 1948.

[Seal] /s/ M. FREIS,

Notary Public in and for
Said County and State.

Received and Filed T.C.U.S. September 2, 1948.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that the notice of deficiency was mailed to the petitioner on August 3, 1948; denies the remaining allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4.(a), (b) and (c). Denies that allegations of error contained in subparagraphs (a) (b) and (c) of paragraph 4 of the petition.

5. (a) Admits that Ralph R. Huesman died on May 3, 1944. Denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) to (f), inclusive. Denies the allegations contained in subparagraphs (b) to (f), inclusive, of paragraph 5 of the petition.

(g). Admits the allegations contained in the first sentence of subparagraph (g); denies the remaining allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h). Denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC.,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel;

E. C. CROUTER,
R. H. KINDERMAN,
Special Attorneys,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. September 28, 1948.

[Title of Tax Court and Cause.]

MOTION TO AMEND PETITION

The above-named petitioner hereby moves to amend its petition, filed in the above-entitled matter on September 2, 1948, as set forth in the amended petition which is attached hereto.

The reason for amending said petition is based upon the fact that the deficiency referred to therein

with accrued interest thereon was paid on behalf of the petitioner by The Farmers & Merchants National Bank of Los Angeles on June 7, 1949, after the mailing of the notice of deficiency and after the filing of said petition. The counsel for the petitioner was not informed of the fact of said payment until on or about May 19, 1950.

Dated May 26, 1950.

/s/ THOMAS R. DEMPSEY,
Counsel for Petitioner.

The petitioner's motion to file amended petition is not opposed.

/s/ CHARLES OLIPHANT, PHN.,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel;

E. C. CROUTER,
R. H. KINDERMAN,
Special Attorneys,
Bureau of Internal Revenue.

[Stamped]: Granted June 7, 1950. William Arnold, Judge.

Received and Filed T.C.U.S. June 7, 1950.

Served June 8, 1950.

[Title of Tax Court and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols: LA:IT:90D:LHP, postmarked August 3, 1948), and as a basis of this proceeding alleges as follows:

(1) The petitioners, Nurma W. Huesman, Fred B. Huesman and The Farmers & Merchants National Bank of Los Angeles, are the duly appointed and acting executors of the Estate of Ralph R. Huesman, deceased. The return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California, Los Angeles, California.

(2) The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on August 3, 1948.

(3) The taxes in controversy are income taxes for the period May 3, 1944, to April 30, 1945. The deficiency asserted is \$57,923.50.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing as a deduction for amounts distributed under section 162(a) the sum of \$80,517.

(b) The Commissioner erred in disallowing as

a deduction for amounts distributed under section 162(b) the sum of \$80,517.

(c) The Commissioner erred in disallowing as a deduction for amounts distributed under section 162(c) the sum of \$80,517.

(5) The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) On May 3, 1944, Ralph R. Huesman died testate. At the time of his death he was President of Desmond's, a California corporation, conducting a merchandising business in that state. There was due and owing him at that time, as compensation for services rendered in that office, the sum of \$80,517.

(b) By the terms of his will the testator made certain specific provisions for his wife and thereafter provided that all of the rest, residue and remainder of the property in his estate be distributed to testamentary trustees upon five separate trusts. The pertinent provision of the will herein material is as follows:

"5. The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusteed Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary, who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00);

which said respective sums shall be distributed as soon as reasonably possible, and the balance of said sum of money shall be paid and distributed by the trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths ($5/10$ ths); to Catholic Foreign Missions Society of America, Inc., one-tenth ($1/10$ th); to Little Sisters of the Poor, at present located at 2700 East First Street, Los Angeles, California, one-tenth ($1/10$ th); and three-tenths ($3/10$ ths) to the Employees' Retirement Plan of Desmond's, a California corporation, with its principal place of business at 616 South Broadway, Los Angeles, California, for the benefit of its employees, provided, however, that at the time of my death I am the owner of a majority of the capital stock of Desmond's, and provided further, that such Employees' Retirement Plan of Desmond's at such time is in existence, and said three-tenths shall be added to the share in said Employees' Retirement Plan of Desmond's for the benefit of those persons in the employ of Desmond's prior to the effective date of said Employees' Retirement Plan of Desmond's and entitled to share thereunder. Such conversion of Trusteed Property into money and payments and distributions made to said organizations shall be made by the Trustees within five (5) years after distribution to the Trustees and shall be made at such times and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trust Estate, and the Trustees may exercise in their sole

discretion as to when and in what amounts such payments and distributions shall be made within said period of five (5) years. In the event that for any reason any of the provisions in this paragraph shall become inoperative, then the portion and the percentage of such sum as to which it shall be inoperative shall be added by the Trustees to the principal of the Trust herein provided for my wife, Nurma W. Huesman, or if she nor my daughter Carol Anne Huesman Marcato be then living, such portion shall go and be distributed equally to my brother Fred H. Huesman and my sister Mathilda Josephine Huesman Doll, and in the event my said brother shall die before distribution to him of any such portion to which he is entitled, such portion shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) to Fred B. Huesman and one-fourth ($\frac{1}{4}$) to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child; and in the event my said sister shall die before distribution to her of any such portion to which she is entitled, such portion shall go and be distributed to her living and lawful descendants per stirpes, provided, however, that if there be no person qualified to take as herein provided, such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California."

(c) Loyola University of Los Angeles is a California corporation which at all times herein mate-

rial qualified as a religious and educational corporation organized and operated exclusively for religious and educational purposes within the meaning of section 23(o) (2) of the Internal Revenue Code. The Regents' Fund of Loyola University of Los Angeles is a building fund constituting an asset of the corporation.

(d) On or about April 10, 1945, the executors of the Estate of Ralph R. Huesman, deceased, in that capacity and in their capacity as testamentary trustees, petitioned the Superior Court for the State of California in and for the County of Los Angeles as the court exercising probate jurisdiction over said estate for instructions and for an order of partial distribution. On April 30, 1945, said court entered its order and decree of partial distribution providing as follows:

“Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, Eexecutors under the Will of Ralph R. Huesman, Deceased, having filed herein on the 10th day of April, 1945, their petition and Supplement to Petition praying for an order allowing and distributing to themselves as Trustees under the Will of Ralph R. Huesman, Deceased, a certain portion of said Estate to which the Trustees are entitled under the terms of the Will, and directing said Executors to deliver said property to themselves as said Trustees, and further directing said Trustees to deliver said property to Loyola University, Regents Fund, as the ultimate beneficiary of said property under said trust; and said petition this day

coming on regularly to be heard, proof having been made to the satisfaction of the Court, the Court finds that notice of the hearing of said petition has been regularly given for the period and in the manner required by Section 1200 of the Probate Code; and no person appearing to contest the same;

“The Court, after hearing the evidence, finds that all the allegations of said petition and Supplement to Petition are true; that among the assets of said Estate and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond’s, a corporation, in the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00); that among the claims filed and allowed is that of Desmond’s, a corporation, amounting in gross to One Hundred Eleven Thousand Seventy-nine 6/100 Dollars (\$111,079.06); that under an order authorizing said Executors to borrow money on an unsecured note, granted by this Court on this day, the Executors will pay to Desmond’s, a corporation, the full amount of decedent’s aforesaid indebtedness plus interest in the total amount of One Hundred Eleven Thousand Seventy-nine 6/100 Dollars (\$111,079.06) and will receive from Desmond’s, the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00), specifically as compensation due to the decedent in the form of a bonus at the time of his death; that as a result of said mutual payments, Desmond’s, claim against the Estate will thereby be fully paid; and the amount of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) received specifically as compensation due to the decedent in the form of a bonus at the time of

his death, shall become available for distribution;

“That by the terms of the Will, the net estate, being in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00), is to be distributed to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as trustees under said Will of Ralph R. Huesman, Deceased; that one of the beneficiaries of said testamentary trust is Loyola University of Los Angeles, Regents Fund, which is entitled to a sum of money equal to approximately Five Per Cent (5%) of the trusteed property, amounting to approximately Ninety-eight Thousand Dollars (\$98,000.00); that said Loyola University is an educational institution located in Los Angeles, California; that said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent’s Will in the amount of said bonus, to wit, the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00); that the State Comptroller through the assistant Inheritance Tax Attorneys, has consented to the granting of the petition for partial distribution, without first having the California Inheritance Taxes determined and paid; that the Estate is but little indebted; that the legacy or share of the Estate set forth above may be distributed to said Trustees and then to Loyola University, Regents’ Fund, as the institution ultimately entitled thereto, without loss to the creditors or injury to the Estate or any person interested therein; that sufficient assets will remain in the hands of the Executors to pay any

debts of administration; that it is unnecessary that the legatee give a bond;

“It Is Therefore Ordered and Decreed that Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Executors of the Estate of Ralph R. Huesman, Deceased, upon receiving said certain sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from Desmond’s, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; and said Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as said Trustees under the Will of Ralph R. Huesman, Deceased, shall distribute such specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Loyola University of Los Angeles, Regents Fund, in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution order herein made.”

(e) On April 30, 1945, said court also entered its order instructing testamentary trustees to make partial distribution, which order provided as follows:

“Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los An-

geles, being the Executors under the Will of Ralph R. Huesman, Deceased, and also being the persons named as Trustees in said Will of Ralph R. Huesman, Deceased, having filed herein on the 10th day of April, 1945, their petition praying for an order instructing, requiring and directing that a certain sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) should be distributed to Loyola University of Los Angeles, Regents Fund, in partial satisfaction of its bequest under Will of Ralph R. Huesman, Deceased, and said petition this day coming on regularly to be heard, proof having been made to the satisfaction of the Court, the Court finds that notice of the hearing on said petition has been regularly given for the period and in the manner required by it under Sections 1120 and 1200 of the Probate Code; and no person appearing to contest the same;

“The Court after hearing the evidence, finds that all the allegations of said petition are true; that Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, are the Trustees appointed by the Will of Ralph R. Huesman, Deceased; that said persons have accepted the trusts created and declared in said Will; that among the assets of said Estate and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond's, a corporation, in the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517); that among the claims filed and allowed is that of Desmond's, a corporation, amount-

ing in gross to One Hundred Eleven Thousand Seventy-nine $\frac{6}{100}$ Dollars (\$111,079.06); that under an order authorizing said Executors to borrow money on an unsecured note, granted by this Court on this day, the Executors will borrow One Hundred Ten Thousand Dollars (\$110,000.00), and pay to Desmond's, a corporation, the full amount of decedent's aforesaid indebtedness plus interest in the total amount of One Hundred Eleven Thousand Seventy-nine $\frac{6}{100}$ Dollars (\$111,079.06), and will receive from Desmond's, the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00), specifically as compensation due to the decedent in the form of a bonus at the time of his death; that as a result of said mutual payments, Desmond's claim against the Estate will thereby be fully paid; and the amount of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00), received specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall become available for distribution;

“That by the terms of the Will, the net estate, being in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00), is to be distributed to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; that one of the beneficiaries of said testamentary trust is Loyola University of Los Angeles, Regents' Fund, which is entitled to a sum of money equal to approximately Five Per Cent (5%) of the trusteed property, amounting to approximately

Ninety-Eight Thousand Dollars (\$98,000.00); that said Loyola University is an educational institution located in Los Angeles California; that said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent's Will in the amount of said bonus, to wit, the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00); that the State Comptroller through the Assistant Inheritance Tax Attorneys, has consented to the granting of the petition for partial distribution, without first having the California Inheritance Taxes determined and paid;

“That under an order and decree of partial distribution granted by this Court on this day, the Executors, upon receiving said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from Desmond's, a corporation, specifically as compensation due the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; that said sum constitutes the sole estate of said testamentary trust; that there are no liabilities to any creditors under said trust; that the said legacy or share of the trust estate set forth above may be distributed to Loyola University, Regents' Fund, as the institution entitled thereto, without loss to the creditors or injury to the trust estate, or any person interested therein;

and that it is unnecessary that the legatee give bond;

“It Is Therefore Ordered and Decreed that the said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00), received by Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Executors of the Estate of Ralph R. Huesman, Deceased, from Desmond's, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, and delivered under order of this Court, as a specific sum to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased, shall be delivered as a specific sum to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution granted hereunder.”

(f) Thereafter on April 30, 1945, Desmond's paid to the executors of the Estate of Ralph R. Huesman, Deceased, the sum of \$80,517 specifically as compensation or bonus for services rendered by the decedent to said corporation prior to his death; and on the same day the executors, pursuant to the order entered by the Superior Court, paid to the testamentary trustees of the trust established by the decedent said sum of \$80,517; and on the same day the trustees of said testamentary trust, pursuant to the order entered by the Superior Court, paid

to Loyola University of Los Angeles, Regents' Fund, said sum of \$80,517. At the time of receipt of said sum by the testamentary trustees and at the time of payment thereof by them, said sum of \$80,517 constituted the only asset of the trust estate.

(g) Thereafter and within the time provided by law the petitioners filed with the Collector of Internal Revenue for the Sixth District of California a fiduciary income tax return for the Estate of Ralph R. Huesman, deceased, on Form 1041 for the fiscal period May 3, 1944, to April 30, 1945. Said return reported a gross income of \$131,140.13, deductions of \$87,828.22 and "amounts distributable to beneficiaries" listed on Schedule A of said return of \$80,517, leaving a net taxable income of \$7,311.22 and a tax liability of \$1,807.71, which was duly paid. Included within the gross income was the sum of \$80,517 received by the decedent's estate from Desmond's specifically as compensation or bonus for services rendered by the decedent prior to his death.

(h) Thereafter, on June 7, 1949, The Farmers & Merchants National Bank of Los Angeles, one of the executors of the Estate of Ralph R. Huesman, deceased, mailed to the Collector of Internal Revenue, Sixth Collection District, Los Angeles, California, a check in the sum of \$71,459.35 along with a letter of transmittal explaining that said check was to cover the income tax deficiency of \$57,923.50 assessed against the Estate of Ralph R. Huesman for the fiscal year ended April 30, 1945, and accrued interest on the deficiency of \$13,525.85

to the date of the letter. A copy of this letter was returned, as requested, to The Farmers & Merchants National Bank of Los Angeles bearing the following stamp and signature: "Received with remittance June 7, 1949, Coll. Int. Rev. Los Angeles, Cal., Teller V, (S) A. N. Verner."

(i) At all times herein material petitioner has kept its books on a cash receipts and disbursements basis.

Wherefore, the petitioner prays that the court may hear the proceeding and determine that there was no deficiency due from the petitioner for the period May 3, 1944, to April 30, 1945; that the petitioner has made an overpayment of its tax for the fiscal year ended April 30, 1945, in the amount of \$71,459.35, and that said overpayment of \$71,459.35, was paid on June 7, 1949, and after the mailing of the notice of deficiency on August 3, 1948.

/s/ THOMAS R. DEMPSEY,
Counsel for Petitioner.

State of California,
County of Los Angeles—ss.

Fred B. Huesman and Nurma W. Huesman, being first duly sworn, depose and say: That they are respectively the duly qualified and acting executor and executrix of the Estate of Ralph R. Huesman, deceased, taxpayer named in the foregoing Amended Petition and authorized to verify the same; that they have read the said Amended Petition and know the contents thereof and that

the same is true of their own knowledge except the matters which are therein stated to be upon information and belief and that as to these matters they believe it to be true.

/s/ FRED B. HUESMAN,

/s/ NURMA W. HUESMAN.

Subscribed and sworn to before me this 31st day of May, 1950.

[Seal] /s/ ARTHUR ROOT,

Notary Public in and for
Said County and State.

My Commission Expires Jan. 29, 1951.

State of California,
County of Los Angeles—ss.

W. D. Baker, being first duly sworn, deposes and says: That he is the Vice President of the Farmers & Merchants National Bank of Los Angeles, a corporation duly qualified and acting as executor of the Estate of Ralph R. Huesman, deceased, taxpayer named in the foregoing Amended Petition, and that he is authorized to make this verification for and on behalf of said corporation; that he has read the said Amended Petition and knows the contents thereof and that the same is true of his own knowledge, except the matters which are therein

stated to be upon information and belief, and that as to those matters he believes it to be true.

/s/ W. D. BAKER.

Subscribed and sworn to before me this 31st day of May, 1950.

[Seal] /s/ M. FREIS,

Notary Public in and for
Said County and State.

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

(Seal)

Office of Internal Revenue Agent in Charge
Los Angeles Division.

LA:IT:90D:LHP

Estate of Ralph R. Huesman, Deceased,
Nurma W. Huesman, Fred B. Huesman, and
The Farmers & Merchants National Bank of Los
Angeles, Executors.
401 South Main Street,
Los Angeles 13, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year May 3, 1944 to April 30, 1945 disclosed a deficiency of \$57,923.50, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner;

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

LHP:vmc

Enclosures:

Statement

Form of waiver

EXHIBIT A
STATEMENT

LA:IT:90D:LHP

Estate of Ralph R. Huesman, Deceased

Nurma W. Huesman, Fred B. Huesman, and
The Farmers & Merchants National Bank of Los Angeles
Executors

401 South Main Street
Los Angeles 13, California

Tax Liability for the Taxable Year
May 3, 1944, to April 30, 1945

	Deficiency
Income tax	\$57,923.50

In making this determination of your income tax liability careful consideration has been given to the report of examination, a copy of which was sent to you on September 2, 1947, to your protest dated September 12, 1947, to your supplemental protest dated March 22, 1948, and to the statements made at the conferences held.

A copy of this letter and statement has been mailed to your representative, Mr. Thomas R. Dempsey, 1104 Pacific Mutual Building, Los Angeles 14, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustments to Net Income

Net income as disclosed by return.....	\$ 7,311.22
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Unallowable deductions:

(a) "Other deductions" decreased.....	\$ 845.59	
(b) Amount distributable to beneficiaries disallowed	80,517.00	81,362.59

Net income adjusted.....	\$88,673.81
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Explanation of Adjustments

(a) Included in gross income in your return is the amount of \$80,517.00 representing a bonus of that amount which was included in the gross estate of decedent, and, under "other deductions," a deduction of \$37,359.89 is claimed representing the federal estate tax attributable to such bonus. It has been determined that the correct amount of the deduction allowable on account of such federal estate tax under section 126 of the Internal Revenue Code, is \$36,514.30, a decrease of \$845.59.

(b) The deduction of \$80,517.00 claimed for "amount distributable to beneficiaries" is disallowed as not constituting a proper deduction under the provisions of section 162 of the Internal Revenue Code.

Computation of Tax

Net income adjusted.....	\$88,673.81	
Less: Exemption	500.00	
	<hr/>	
Surtax net income.....	\$88,173.81	
Surtax		\$57,086.00
Net income adjusted.....	\$88,673.81	
Less: Exemption	500.00	
	<hr/>	
Net income subject to normal tax.....	\$88,173.81	
Normal tax at 3%.....		\$ 2,645.21
	<hr/>	
Correct income tax liability.....	\$59,731.21	
Income tax liability shown on return, account No. July 355009—1945		1,807.71
	<hr/>	
Deficiency of income tax.....	\$57,923.50	

Lodged and filed T.C.U.S. June 7, 1950.

[Title of Tax Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel as follows:

1. On May 3, 1944, Ralph R. Huesman died testate, a resident of the State of California. At the time of his death he was President of Desmond's, a California corporation, which was conducting a retail merchandising business in Southern California. There was due and owing to him from said corporation at the time of his death the sum of \$80,517.00 as compensation for services rendered as President of Desmond's up to the date of his death.

2. By Order of the Superior Court of Los An-

geles entered June 14, 1944, Decedent's Last Will and Testament was therein admitted to probate. The net value of the said Ralph R. Huseman's estate exceeded \$250,000.00, and his wife, Nurma W. Huseman, who survived him, elected to take under the Decedent's Will. A copy of said Will is attached hereto, marked Exhibit A, and by reference made a part hereof.

3. By the applicable terms of said Ralph R. Huesman's Will, he devised and bequeathed his residuary estate to trustees to make certain specified distributions. Among the legatees to whom distribution was thus made, pursuant to said Will, was Loyola University of Los Angeles, Regents' Fund. At all times herein material said University was included in the cumulative list of organizations, contributions to which were ruled by the Commissioner of Internal Revenue deductible under sections 23(o) and 23(q) of the Internal Revenue Code. The Regents' Fund is the building fund of said University and is used solely for the University in its building expansion program. Said fund is administered by the President of the University, and checks drawn thereon are signed by him or by the Treasurer.

4. On or about April 10, 1945, the Executors of the Estate of Ralph R. Huesman, Deceased, in that capacity and in their capacity as testamentary trustees, petitioned the Superior Court for the State of California in and for the County of Los Angeles, as the court exercising probate jurisdiction of said

Estate, for instructions. A copy of said Petition is attached hereto, marked Exhibit B, and by reference made a part hereof. Concurrently therewith said Executors and testamentary trustees filed a Petition for an Order of Partial Distribution. Said Petition is attached hereto, marked Exhibit C, and by reference made a part hereof. Also therewith said Executors filed with said Court a petition for order to borrow money on unsecured note. A copy of said Petition is attached hereto marked Exhibit H and by reference made a part hereof. No objection was made to any of said Petitions by any party or person on whom notice of the filing of said Petition was served. The hearing on all of said Petitions was had on April 30, 1945, was concurrent and was not contested by any party on whom notice was served. Notices of filing of said Petitions and of all others herein mentioned filed with said Superior Court were served upon the following:

Nurma W. Huesman—10811 Ambazac Way, Bel Air, Los Angeles 24, California.

Carol Ann Huesman Marcato—24 East 82nd St., New York, New York.

Fred H. Huesman—728 E. Windsor Road, Glendale, California.

Mathilda Josephine Huesman Doll—1219 Viscano Drive, Glendale, California.

Frank F. Huesman—915 East Lomita Avenue, Glendale, California.

Fred B. Huesman—616 South Broadway, Los Angeles, California.

Marcellus Doll—714 North Linden Drive, Beverly Hills, California.

Mary Gerard Huesman—728 East Windsor Road, Glendale, California.

Dr. Henry M. Rooney—832 South Windsor Road, Los Angeles, California.

Mrs. May Rooney—832 South Windsor Road, Los Angeles, California.

Leonora Zinner—1604 Fremont Avenue, South Pasadena, California.

Mrs. Gregory Haran—456 Redwood Road, Box #456, Corte Madera, California.

5. On April 30, 1945, said Court entered its Order instructing testamentary trustees to make partial distribution. A copy of said Order is attached hereto, marked Exhibit D, and by reference made a part hereof. Concurrently therewith said Court also entered an Order and Decree of Partial Distribution. A copy of said Order is attached hereto, marked Exhibit E, and by reference made a part hereof. Concurrently therewith said Court also entered an Order authorizing Executors to borrow money on unsecured Note. A copy of said Order is attached hereto marked Exhibit I and by reference made a part hereof. Entry by the Superior Court of said Order and of all others herein mentioned was not contested by any party to whom notice was given in this action.

6. Thereafter on April 30, 1945, Desmond's paid to the Executors of the Estate of Ralph R. Huesman, Deceased, the sum of \$80,517.00 as compensa-

tion or bonus for services rendered by the Decedent to said corporation up to the date of his death. Thereafter on the same day the Executors, pursuant to the aforesaid Order of Partial Distribution entered by the Superior Court, paid to the testamentary trustees of the aforesaid testamentary trust established by the Decedent the sum of \$80,517.00. Thereafter on the same day the trustees of said testamentary trust, pursuant to the Order entered by said Superior Court instructing them to make partial distribution, paid to Loyola University of Los Angeles, Regents' Fund, the sum of \$80,517.00. At the time of the receipt of the sum of \$80,517.00 by the testamentary trustees as aforesaid and at the time of distribution thereof by them as aforesaid, the sum of \$80,517.00 constituted the only cash asset of the trust estate. The only other then existing asset of said trust estate was the right thereof to receive the trust corpus from the decedent's estate, the petitioner herein.

7. Thereafter and within the time provided by law the Petitioner filed with the Collector of Internal Revenue for the Sixth District of California, a fiduciary income tax return for the Estate of Ralph R. Huesman, Deceased. A copy of said return is attached hereto, marked Exhibit F, and by this reference made a part hereof.

8. At all times herein material Petitioner kept its books and filed its Federal income tax returns on a cash receipts and disbursements basis.

9. The original assets of the petitioner were set

up on the books of account as of May 3, 1944, as shown by the journal entry of said date, copy of which appears on page 1 of Exhibit G, attached hereto, and by reference made a part hereof. The remainder of said Exhibit G consists of copies of all journal entries involving the said sum of \$80,517.00 appearing on the books of account of the petitioner and of the testamentary trust hereinabove referred to. Said Exhibit G also contains copies of the explanations on said books accompanying said journal entries and, in addition, the titles of the ledger accounts involved, which are designated by number in said journal entries.

10. The sum of \$110,000.00 was borrowed by the petitioner from The Farmers and Merchants National Bank of Los Angeles on April 30, 1945, on a three-month unsecured note of the petitioner. On July 30, 1945, the sum of \$110,000.00 was repaid by check of the petitioners to said bank in payment of said note, together with the interest on said note of \$556.11 to date of payment. Said sum of \$110,000.00 so borrowed was applied by the petitioner to the payment made to Desmond's on the Claim of Desmond's referred to in paragraph VI of Exhibit B, hereof.

11. The funds used for repayment of said loan were acquired by the petitioner from distributions made by Desmond's in complete liquidation of said corporation in exchange for stock of said corporation held by the estate.

12. At at all times herein material, the decedent, Ralph R. Huesman, kept his books and filed his federal income tax returns on a cash receipt and disbursements basis of accounting.

13. Subject to the objection of respondent that the facts herein in this paragraph agreed to are not relevant or material, it is hereby stipulated and agreed that within the time allowed by law for the filing thereof the testamentary trustees under the will of the said Ralph R. Huesman, Deceased, filed with the Collector of Internal Revenue for the Sixth Collection District of California a fiduciary income tax return (Form 1041) for the fiscal year ended April 30, 1945. A copy of said return is attached hereto, marked Exhibit J and by this reference made a part hereof.

DEMPSEY, THAYER,
DEIBERT & KUMLER.

By /s/ H. B. THOMPSON,
Of Counsel.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel, Bureau of
Internal Revenue.

EXHIBIT A

Last Will and Testament of
Ralph R. Huesman

I, Ralph R. Huesman, a resident of Los Angeles, California, being of sound mind and memory and not acting under duress, menace, fraud, or the undue

influence of any person, do make, publish and declare this my Last Will and Testament, hereby revoking any and all Wills and Codicils by me at any time heretofore made.

Article I.

I direct my Executors to pay all my just debts and funeral expenses as soon as practicable after my death, and to pay out of the principal of my general estate all valid estate, inheritance, transfer and succession taxes which may be imposed or assessed during the period of administration on my property or estate or on the transmission thereof by my death or on any bequest or interest hereunder.

Article II.

I declare that I am married and that my wife is Nurma W. Huesman, and that I have only one child now living, namely, my daughter, Carol Anne Huesman Marcato.

Article III.

I declare that all my property in which, to the date hereof, I have any interest is community property. It is my intention hereby to dispose of the entire community [1*] property, real and personal, and that my wife shall elect whether she will take under this Will or whether she shall take the rights in connection with said community property given

*[The signature of Ralph R. Huesman appears in the left hand margin of each page of the original Last Will and Testament. Figures in brackets in this printed copy appear at the foot of the original pages and follow the last word appearing on each page of the original.]

her by law. Should she elect to take any of the rights to said community property given her by law, then she shall take nothing under this Will and the provisions herein contained in her favor shall be cancelled.

Nothing herein shall be construed as requiring my wife to elect between taking under the Will and her rights as conferred by law to make application for and receive family allowance and a probate homestead, and the selection by my wife of a probate homestead and any application for, and the receipt of, a family allowance shall not be deemed an election by my wife to take her community rights or as an election not to take under the provisions of this Will.

Article IV.

I am so making the trust provisions hereinafter set forth with reference to my wife, because I am carrying insurance in her favor as beneficiary, of a substantial amount. If my wife shall elect to take under the provisions of this Will and in the event this insurance should lapse, or, if for any reason my wife shall receive less than Twenty-five Thousand Dollars (\$25,000.00) as a result of insurance policies carried by me of which she is the beneficiary, I direct that she shall receive from my estate the difference between the amount she shall receive from such insurance and Twenty-five Thousand Dollars (\$25,000.00). I give and bequeath to my wife a sum equal to the difference between Twenty-five Thousand Dollars (\$25,000.00)

and such sum under Twenty-five Thousand Dollars (\$25,000.00) that she may receive from such insurance, this provision to [2] take effect only if she elects to take under the terms of this Will.

Article V.

I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of every kind and nature and wherever situated, which I may own at the time of my death, and all other property over which I may have any power of disposition (all of said property being hereinafter referred to as the "Trusted Property"), to the Trustees hereinafter named, to have and to hold upon the following trusts and conditions:

A. Wherever the "net value" of my estate is hereinafter mentioned, it shall mean the net value of my estate as so fixed by the California Inheritance Tax Appraiser, or appraisers, and distributed to the Trustees, after deducting all claims, liabilities, taxes chargeable against the estate and those payable therefrom under the terms of this Will, administration expenses, executors' and attorneys' fees and other obligations from the gross value of my estate.

In the event my wife shall elect to take under this Will, then all property subject to administration hereunder, whether community property, or my separate property, shall be considered in determining the net value of my estate; but in the event my wife shall elect to take her community rights

and not to take under this Will, then one-half the community property, together with my separate property, if any, and all other property that is subject to distribution to the Trustees under the terms of this Will shall be considered in determining the net value of my estate. [3]

B. If my wife, Nurma W. Huesman, shall predecease me, or we shall die in a common accident, or in the event she survives me, and shall die prior to making her election as to whether or not she shall take under the terms of this Will, then in any such event and providing the net value of said estate is less than Two Hundred and Fifty Thousand Dollars (\$250,000.00) then the provisions with reference to the Trusteed Property shall be as follows:

1. The Trustees shall set aside forty per cent (40%) of the Trusteed Property as a separate trust for my daughter, Carol Anne Huesman Marcato. The Trustees shall pay to my said daughter, the entire net income from her trust as long as she shall live. I desire that my said daughter shall receive at least Six Thousand Dollars (\$6,000.00) a year as income from this trust so long as my wife Nurma W. Huesman shall live, and thereafter that she shall receive at least Twelve Thousand Dollars (\$12,000.00) a year as income from this trust, and if the net income from such trust shall be less than said amount, such deficiency shall be made up out of the principal of such trust. The said minimum provisions hereinabove contained shall be net to my said daughter after the payment of taxes and

all charges. The Trustees shall set aside one-third ($\frac{1}{3}$) of said 40% of the Trusteed Property to be distributed to my said daughter as follows: when my said daughter shall attain the age of thirty (30) years, the Trustees shall pay to her one-fourth ($\frac{1}{4}$) of said one-third of said 40% of the Trusteed Property; when my said daughter shall attain the age of thirty-five (35) years, the Trustees shall pay to her one-third ($\frac{1}{3}$) of the remainder of said one-third of said 40% of the Trusteed Property; when my said daughter shall attain the age of forty (40) years, the Trustees shall pay to her one-half ($\frac{1}{2}$) of the remainder of said one-third of said (40%) of the [4] Trusteed Property; and when my said daughter shall attain the age of fifty (50) years, the Trustees shall pay to her the entire balance of said one-third of said 40% of the Trusteed Property. The remaining two-thirds ($\frac{2}{3}$) of said Trusteed Property shall be held in trust and the income therefrom shall be distributed as hereinabove provided, to my said daughter so long as she shall live. If my said daughter shall not survive me, or upon the death of my said daughter, in either such event, the provisions herein for her benefit shall terminate and the Trustees shall distribute the remainder of said 40% of the Trusteed Property, together with accumulations, if any, to her lawful issue, and if she be not survived by lawful issue, to my brother Fred H. Huesman, and my sister Mathilda Josephine Huesman Doll, share and share alike, and in the event my said brother shall die before distribution to him of the entire share

to which he is entitled, such share or undistributed remainder shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) thereof to Fred B. Huesman and one-fourth ($\frac{1}{4}$) thereof to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child, and in the event my said sister shall die before distribution to her of the entire share to which she is entitled, such share or undistributed remainder shall go and be distributed to her living and lawful descendants per stirpes, provided, however, that if there be no person qualified to take as herein provided, such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

2. The Trustees shall distribute forty per cent (40%) of the Trusteed Property to my brother Fred H. Huesman and [5] my sister Mathilda Josephine Huesman Doll, share and share alike, which said property shall be converted into money and then paid to my said brother and sister at any time within five (5) years after distribution of the Trusteed Property to the Trustees, provided, however, that not less than one-fifth ($\frac{1}{5}$) of said Trusteed Property shall be converted into money and distributed by said Trustees each year until fully distributed. In the event my said brother shall die before distribution to him of the entire share to which he is entitled, such share or undis-

tributed remainder shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) thereof to Fred B. Huesman and one-fourth ($\frac{1}{4}$) thereof to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child, and in the event my said sister shall die before distribution to her of the entire share to which she is entitled, such share or undistributed remainder shall go and be distributed to her living and lawful descendants per stirpes, provided, however, that if there be no person qualified to take as herein provided, such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

3. The Trustees shall convert twenty per cent (20%) of the Trusteed Property into money and distribute the same to the following named organizations in the proportions that follow: To Loyola University of Los Angeles, Regents' Fund, five-tenths ($\frac{5}{10}$); to Catholic Foreign Missions Society of America, Inc., one-tenth ($\frac{1}{10}$); to Little Sisters of the Poor, at present located at 2700 East First Street, Los [6] Angeles, California, one-tenth ($\frac{1}{10}$); and three-tenths ($\frac{3}{10}$) to the Employees' Retirement Plan of Desmond's, a California corporation, with its principal place of business at 616 South Broadway, Los Angeles, California, for the benefit of its employees, provided, however, that at the time of my death I am the owner of a majority of the

capital stock of Desmond's, and provided further, that such Employees' Retirement Plan of Desmond's at such time is in existence, and said three-tenths shall be added to the share in said Employees' Retirement Plan of Desmond's for the benefit of those persons in the employ of Desmond's prior to the effective date of said Employees' Retirement Plan of Desmond's and entitled to share thereunder. Such conversion of Trusteed Property into money and payments and distributions made to said organizations shall be made by the Trustees within five (5) years after the death of my said wife, and shall be made at such times and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trusteed estate and market conditions, and the Trustees may exercise their sole discretion as to when and in what amounts such conversions and payments and distribution shall be made within said period of five (5) years. In the event that any of the organizations hereinabove named are not in existence or are not entitled to take by reason of any conditions or exceptions hereinabove stated, then such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

C. If my wife, Nurma W. Huesman, shall predecease me, or we shall die in a common accident, or in the event she survives me, and shall die prior to making her election as to whether or not she shall take under the terms of this Will, [7] then in such event and providing the net value of said estate

is Two Hundred and Fifty Thousand Dollars (\$250,000.00), or more, then the provisions with reference to the Trusteed Property shall be as follows:

1. The Trustees shall pay to my brother, Frank F. Huesman, a sum of money equal to two per cent (2%) of the Trusteed Property, which said money shall be paid to my said brother in five (5) equal installments. Should my said brother die before receiving distribution of the entire share herein provided to be paid to him, then the undistributed remainder thereof shall be distributed to my nephew, Fred B. Huesman, and in the event my said nephew shall die before distribution, then the undistributed remainder thereof shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

2. The Trustees shall set aside forty per cent (40%) of the Trusteed Property as a separate trust for my daughter Carol Anne Huesman Marcato. The Trustees shall pay to my said daughter, the entire net income from her trust as long as she shall live. I desire that my said daughter shall receive at least Six Thousand Dollars (\$6,000.00) a year as income from this trust so long as my wife Nurma W. Huesman shall live, and thereafter that she shall receive at least Twelve Thousand Dollars (\$12,000.00) a year as income from this trust, and if the net income from such trust shall be less than said amount, such deficiency shall be made up out of the principal of such trust. The said minimum

provisions hereinabove contained shall be net to my said daughter after the payment of taxes and all charges. The Trustees shall set aside one-third ($\frac{1}{3}$) of said 40% of the Trusteed Property to be distributed to my said daughter as follows: when my said daughter shall [8] attain the age of thirty (30) years, the Trustees shall pay to her one-fourth ($\frac{1}{4}$) of said one-third of said 40% of the Trusteed Property; when my said daughter shall attain the age of thirty-five (35) years, the Trustees shall pay to her one-third ($\frac{1}{3}$) of the remainder of said one-third of said 40% of the Trusteed Property; when my said daughter shall attain the age of forty (40) years, the Trustees shall pay to her one-half ($\frac{1}{2}$) of the remainder of said one-third of said 40% of the Trusteed Property; and when my said daughter shall attain the age of fifty (50) years, the Trustees shall pay to her the entire balance of said one-third of said 40% of the Trusteed Property. The remaining two-thirds ($\frac{2}{3}$) of said Trusteed Property shall be held in trust and the income therefrom shall be distributed as hereinabove provided, to my said daughter so long as she shall live. If my said daughter shall not survive me, or upon the death of my said daughter, in either such event, the provisions herein for her benefit shall terminate and the Trustees shall distribute the remainder of said 40% of the Trusteed Property, together with accumulations, if any, to her lawful issue, and if she be not survived by lawful issue, to my brother Fred H. Huesman, and my sister Mathilda Josephine Huesman Doll, share and share alike, and in the event my said

brother shall die before distribution to him of the entire share to which he is entitled, such share or undistributed remainder shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) thereof to Fred B. Huesman and one-fourth ($\frac{1}{4}$) thereof to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child, shall be distributed to the lawful descendants of said child, and in the event my said sister shall die before [9] distribution to her of the entire share to which she is entitled, such share or undistributed remainder shall go and be distributed to her living and lawful descendants per stirpes, provided, however, that if there be no person qualified to take as herein provided, such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

3. The Trustees shall pay to my brother, Fred H. Huesman, a sum of money equal to twenty-four per cent (24%) of the Trusteed Property, which said money shall be paid to my said brother any time within five (5) years after distribution to the Trustees, provided, however, that not less than one-fifth ($\frac{1}{5}$) of said sum shall be distributed by the Trustees during each calendar year until the full sum is distributed. In the event my said brother shall die before distribution to him of the said entire sum, such share or its undistributed remainder shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) thereof to Fred B. Huesman and one-fourth ($\frac{1}{4}$) thereof to Mary Gerard Huesman, ex-

cept that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child, and if there be no person qualified to take as herein provided, such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

4. The Trustees shall pay to my sister Mathilda Josephine Huesman Doll, a sum of money equal to twenty-four per cent (24%) of the Trusteed Property, which said money shall be paid to my said sister any time within five (5) years after distribution to the Trustees, provided, however, that not less than one-fifth ($1/5$) of said sum shall be distributed by [10] the Trustees during each calendar year until the full sum is distributed. In the event my said sister shall die before distribution to her of the said entire sum, such share, or its undistributed remainder, shall go and be distributed to her living, lawful descendants per stirpes, and if she be not survived by any such descendants, then such share, or its undistributed remainder shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

5. The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusteed Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars

(\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); which said respective sums shall be distributed as soon as reasonably possible, and the balance of said sum of money shall be paid and distributed by the Trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, four-tenths ($4/10$); to Catholic Foreign Missions Society of America, Inc., one-tenth ($1/10$); to Little Sisters of the Poor, at present located at 2700 East First Street, Los Angeles, California, one-tenth ($1/10$); to St. Vincent's Hospital, at present located at Third and Alvarado Streets, Los Angeles, California, one-twentieth ($1/20$); to the Children's Hospital of Los Angeles, one-twentieth ($1/20$); and three-tenths ($3/10$) to the Employees' Retirement Plan of Desmond's, a California corporation with its principal place of business at 616 South Broadway, Los Angeles, California, for the benefit of its employees, provided, however, that at the [11] time of my death I am the owner of a majority of the capital stock of Desmond's, and provided further, that such Employees' Retirement plan of Desmond's at such time is in existence, and said three-tenths shall be added to the share in said Employees' Retirement Plan of Desmond's for the benefit of those persons in the employ of Desmond's prior to the effective date of said Employees' Retirement Plan of Desmond's and entitled to share thereunder. Such conversion of Trusteed Property into money and

payments and distributions made to said organizations shall be made by the Trustees within five (5) years after the death of my said wife, and shall be made at such times and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trusteed estate and market conditions, and the Trustees may exercise their sole discretion as to when and in what amounts such conversions and payments and distribution shall be made within said period of five (5) years. In the event that any of the organizations hereinabove named are not in existence or are not entitled to take by reason of any conditions or exceptions hereinabove stated, then such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

D. If my wife shall elect to take under the terms of this Will, and in the event that the net value of said estate is less than Two Hundred and Fifty Thousand Dollars (\$250,000.00), then the provisions with reference to the Trusteed Property shall be as follows:

1. The Trustees shall forthwith set aside all the Trusteed Property as a trust for the benefit of my wife Nurma W. Huesman, and shall pay to her the entire net income therefrom as long as she shall live. I desire that my wife shall [12] receive at least Eighteen Thousand Dollars (\$18,000.00) a year as income from this trust and if the net income from this trust shall be less than said amount, such deficiency shall be made up out of the principal

of such trust. The said minimum provision hereinabove contained shall be net to my said wife after the payment of taxes and all charges. Upon the death of my wife, the income from this trust shall be paid to my said daughter Carol Anne Huesman Marcato as long as she shall live. I desire that my said daughter shall receive at least Twelve Thousand Dollars (\$12,000.00) a year as income from this trust, and if the net income from such trust shall be less than said amount, such deficiency shall be made up out of the principal of such trust. The said minimum provision hereinabove contained shall be net to my said daughter after the payment of taxes and all charges. Upon the death of my wife, the Trustees shall set aside one-third of this trust to be distributed to my said daughter as follows: when my said daughter shall attain the age of thirty (30) years, the Trustees shall pay to her one-fourth ($\frac{1}{4}$) of said one-third; when my said daughter shall attain the age of thirty-five (35) years, the Trustees shall pay to her one-third ($\frac{1}{3}$) of the remainder of said one-third; when my said daughter shall attain the age of forty (40) years, the Trustees shall pay to her one-half ($\frac{1}{2}$) of the remainder of said one-third; and when my said daughter shall attain the age of fifty (50) years, the Trustees shall pay to her the entire balance of said one-third of this trust. The remaining two-thirds ($\frac{2}{3}$) of said trust shall be held in trust and the income therefrom shall be distributed as hereinabove provided, to my said daughter, so long as she shall live. In the event my said daughter shall not sur-

vive my wife, or upon the death [13] of my said daughter, in either such event, the provisions herein for her benefit shall terminate and the Trustees shall distribute the remainder of this said trust to the lawful issue of her body.

E. If my wife shall elect to take under the terms of this Will, and in the event that the net value of my estate if Two Hundred and Fifty Thousand Dollars (\$250,000.00) or more, then the provisions with reference to the Trusteed Property shall be as follows:

1. The Trustees shall pay to my brother Frank F. Huesman, a sum of money equal to two per cent (2%) of the Trusteed Property, which said money shall be paid to my said brother in five (5) equal yearly installments. Should my said brother die before receiving distribution of the entire share therein provided to be paid to him, then such share or its undistributed remainder shall be distributed to my nephew Fred B. Huesman, and in the event my said nephew shall die before distribution, then the undistributed remainder thereof shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

2. The Trustees shall forthwith set aside as a separate trust for the benefit of my wife Nurma W. Huesman, sixty per cent (60%) of the principal of the Trusteed Property and shall pay to her the entire net income therefrom as long as she shall live. I desire that my wife shall receive at least Eighteen Thousand Dollars (\$18,000.00) a year as income

from this trust and if the net income from this trust shall be less than said amount, such deficiency shall be made up out of the principal of such trust. The said minimum provision hereinabove contained shall be net to my said wife after the payment of taxes and all charges. Upon the death of my wife, the income from this trust shall be paid to my said daughter Carol Anne Huesman [14] Marcato as long as she shall live. I desire that my said daughter shall receive at least Twelve Thousand Dollars (\$12,000.00) a year as income from this trust, and if the net income from such trust shall be less than said amount, such deficiency shall be made up out of the principal of such trust. The said minimum provision hereinabove contained shall be net to my said daughter after the payment of taxes and all charges. Upon the death of my wife, the Trustees shall set aside one-third of this trust to be distributed to my said daughter as follows: when my said daughter shall attain the age of thirty (30) years, the Trustees shall pay to her one-fourth ($\frac{1}{4}$) of said one-third; when my said daughter shall attain the age of thirty-five (35) years, the Trustees shall pay to her one-third ($\frac{1}{3}$) of the remainder of said one-third; when my said daughter shall attain the age of forty (40) years, the Trustees shall pay to her one-half ($\frac{1}{2}$) of the remainder of said one-third; and when my said daughter shall attain the age of fifty (50) years, the Trustees shall pay to her the entire balance of said one-third of this trust. The remaining two-thirds ($\frac{2}{3}$) of said trust shall be held in trust and the income

therefrom shall be distributed as hereinabove provided, to my said daughter, so long as she shall live. In the event my said daughter shall not survive my wife, or upon the death of my said daughter, in either such event, the provisions herein for her benefit shall terminate and the Trustees shall distribute the remainder of this said trust to the lawful issue of her body.

3. The Trustees shall pay to my brother Fred H. Huesman, a sum of money equal to fourteen per cent (14%) of the Trusteed Property, which said money shall be paid to my said brother any time within five (5) years after distribution to the Trustees, provided, however, that not less than one-fifth [15] ($\frac{1}{5}$) of said sum shall be distributed by the Trustees during each calendar year until the full sum is distributed. In the event my said brother shall die before distribution to him of the said entire sum, such share, or its undistributed remainder, shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) thereof to Fred B. Huesman and one-fourth ($\frac{1}{4}$) thereof to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child, and if there be no person qualified to take as herein provided, such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

4. The Trustees shall pay to my sister Mathilda

Josephine Huesman Doll, a sum of money equal to fourteen per cent (14%) of the Trusteed Property, which said money shall be paid to my said sister any time within five (5) years after distribution to the Trustees, provided, however, that not less than one-fifth ($1/5$) of said sum shall be distributed by the Trustees during each calendar year until the full sum is distributed. In the event my said sister shall die before distribution to her of the said entire sum, such share, or its undistributed remainder, shall go and be distributed to her living, lawful descendants per stirpes, and if she be not survived by any such descendants, then such share, or its undistributed remainder shall be added by the Trustees to the principal of the trust herein provided for my wife, Nurma W. Huesman, subject to all the terms of said trust.

5. The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusteed Property as follows: To my friend Dr. Henry M. Rooney, and if he be [16] deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); which said respective sums shall be distributed as soon as reasonably possible, and the balance of said sum of money shall be paid and distributed by the Trustees to the following named organizations and

in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths (5/10); to Catholic Foreign Missions Society of America, Inc., one-tenth (1/10); to Little Sisters of the Poor, at present located at 2700 East First Street, Los Angeles, California, one-tenth (1/10); and three-tenths (3/10) to the Employees' Retirement Plan of Desmond's, a California Corporation with its principal place of business at 616 South Broadway, Los Angeles, California, for the benefit of its employees, provided, however, that at the time of my death I am the owner of a majority of the capital stock of Desmond's, and provided further, that such Employees' Retirement Plan of Desmond's at such time is in existence, and said three-tenths shall be added to the share in said Employees' Retirement Plan of Desmond's for the benefit of those persons in the employ of Desmond's prior to the effective date of said Employees' Retirement Plan of Desmond's and entitled to share thereunder. Such conversion of Trusteed Property into money and payments and distributions made to said organizations shall be made by the Trustees within five (5) years after distribution to the Trustees and shall be made at such times and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trust Estate, and the Trustees may exercise in their sole discretion as to when and in [17] what amounts such payments and distributions shall be made within said period of five (5) years. In the event that for any reason any of the provisions in this paragraph shall be-

come inoperative, then the portion and the percentage of such sum as to which it shall be inoperative shall be added by the Trustees to the principal of the Trust herein provided for my wife Nurma W. Huesman, or if she nor my daughter Carol Anne Huesman Marcato be then living, such portion shall go and be distributed equally to my brother Fred H. Huesman and my sister Mathilda Josephine Huesman Doll, and in the event my said brother shall die before distribution to him of any such portion to which he is entitled, such portion shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) to Fred B. Huesman and one-fourth ($\frac{1}{4}$) to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child; and in the event my said sister shall die before distribution to her of any such portion to which she is entitled, such portion shall go and be distributed to her living and lawful descendants per stirpes, provided, however, that if there be no person qualified to take as herein provided, such share shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

F. If my wife shall elect not to take under the terms of this Will, and in the event that the net value of my estate distributed by the Trustees is less than One Hundred and Twenty-five Thousand Dollars (\$125,000.00), then the provisions with

reference to the Trusteed Property shall be as follows:

1. The Trustees shall forthwith set aside as a separate trust for the benefit of my daughter Carol Anne Huesman [18] Marcato, forty per cent (40%) of the principal of the Trusteed Property and shall pay to her the entire net income therefrom as long as she shall live. I desire that my said daughter shall receive at least Six Thousand Dollars (\$6,000.00) a year as income from this trust so long as my wife Nurma W. Huesman shall live, and thereafter that she shall receive at least Twelve Thousand Dollars (\$12,000.00) a year as income from this trust, and if the net income from this trust shall be less than said amount, such deficiency shall be made up out of the principal of such trust. The said minimum provisions hereinabove contained shall be net to my said daughter after the payment of taxes and all charges. The Trustees shall set aside one-third ($\frac{1}{3}$) of said trust to be distributed to my said daughter as follows: when my said daughter shall attain the age of thirty (30) years, the Trustees shall pay to her one-fourth ($\frac{1}{4}$) of said one-third of said trust; when my said daughter shall attain the age of thirty-five (35) years, the Trustees shall pay to her one-third of the remainder of said one-third of said trust; when my said daughter shall attain the age of forty (40) years, the Trustees shall pay to her one-half ($\frac{1}{2}$) of the remainder of said one-third of said trust; and when my said daughter shall attain the age

of fifty (50) years; the Trustees shall pay to her the entire balance of said one-third of said trust. The remaining two-thirds ($\frac{2}{3}$) of said trust shall be held in trust and the income therefrom shall be distributed as hereinabove provided, to my said daughter, so long as she shall live. Upon the death of my said daughter, the provisions herein for her benefit shall terminate and the Trustees shall distribute the remainder of this said trust to the lawful issue of her body. [19]

2. The Trustees shall pay to my brother Fred H. Huesman, a sum of money equal to twenty per cent (20%) of the Trusteed Property, which said money shall be paid to my said brother at any time within five (5) years after distribution to the Trustees, provided, however, that no less than one-fifth ($\frac{1}{5}$) of said sum shall be distributed by the Trustees during each calendar year until the full sum is distributed. In the event my said brother shall not survive me or shall die before distribution to him of said entire sum, such share or undistributed remainder shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) to Fred B. Huesman and one-fourth ($\frac{1}{4}$) to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child, and if he be not survived by any such descendants, then such share or its undistributed remainder shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

3. The Trustees shall pay to my sister Mathilda Josephine Huesman Doll, a sum of money equal to twenty per cent of the Trusteed Property, which said money shall be paid to my said sister at any time within five (5) years after distribution to the Trustees, provided, however, that no less than one-fifth ($1/5$) of said sum shall be distributed by the Trustees during each calendar year until the full sum is distributed. In the event my said sister shall not survive me or shall die before distribution to her of said entire sum, such share or its undistributed remainder shall go and be distributed to her living, lawful descendants, per stirpes, and if she be not survived by any such descendants, then such share or its undistributed remainder shall be distributed to my heirs at law in [20] accordance with the laws of succession of the State of California.

4. The Trustees shall convert twenty per cent (20%) of the Trusteed Property into money and distribute the same to the following named organizations in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths ($5/10$ ths); to Catholic Foreign Missions Society of America, Inc., one-tenth ($1/10$ th); to Little Sisters of the Poor at present located at 2700 East First Street, Los Angeles, California, one-tenth ($1/10$ th); and three-tenths ($3/10$ ths) to the Employees' Retirement Plan of Desmond's, a California corporation with its principal place of business at 616 South Broadway, Los Angeles, California,

for the benefit of its employees, provided, however, that at the time of my death I am the owner of a majority of the capital stock of Desmond's, and provided further, that such Employees' Retirement Plan of Desmond's at such time is in existence, and said three-tenths shall be added to the share in said Employees' Retirement Plan of Desmond's for the benefit of those persons in the employ of Desmond's prior to the effective date of said Employees' Retirement Plan of Desmond's and entitled to share thereunder. Such conversion of Trusteed Property into money and payments and distributions made to said organizations shall be made by the Trustees within five (5) years after distribution to the Trustees and shall be made at such times and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trust Estate, and the Trustees may exercise in their sole discretion as to when and in what amounts such conversions and payments and distribution shall be made within said period of five (5) years. If distribution cannot be made to any of the foregoing organizations by reason of any condition or proviso herein contained, [21] or by reason of the non-existence of an organization qualified to take distribution, then the share that would otherwise have been distributed to such organization shall be distributed to my heirs at law in accordance with the laws of succession of the State of California.

G. If my wife shall elect not to take under the terms of this Will, and in the event the net value of

my estate is One Hundred and Twenty-five Thousand Dollars (\$125,000.00), or more, then the provisions with reference to the Trusteed Property shall be as follows:

1. The Trustees shall forthwith set aside as a separate trust for the benefit of my daughter Carol Anne Huesman Marcato forty (40%) per cent of the principal of the Trusteed Property and shall pay to her the entire net income therefrom as long as she shall live. I desire that my said daughter shall receive at least Six Thousand Dollars (\$6,000.00) a year as income from this trust so long as my wife Nurma W. Huesman shall live, and thereafter that she shall receive at least Twelve Thousand Dollars (\$12,000.00) a year as income from this trust, and if the net income from this trust shall be less than said amount, such deficiency shall be made up out of the principal of such trust. The said minimum provisions hereinabove contained shall be net to my said daughter after the payment of taxes and all charges. The Trustees shall set aside one-third ($\frac{1}{3}$ rd) of said trust to be distributed to my said daughter as follows: when my said daughter shall attain the age of thirty (30) years, the Trustees shall pay to her one-fourth ($\frac{1}{4}$) of said one-third of said trust; when my said daughter shall attain the age of thirty-five (35) years, the Trustees shall pay to her one-third of the remainder of said one-third of said trust; when my said daughter shall attain the age of forty (40) [22] years, the Trustees shall pay to her one-half ($\frac{1}{2}$) of the remainder of said one-third of

said trust; and when my said daughter shall attain the age of fifty (50) years, the Trustees shall pay to her the entire balance of said one-third of said trust. The remaining two-thirds ($\frac{2}{3}$) of said trust shall be held in trust and the income therefrom shall be distributed as hereinabove provided, to my said daughter, so long as she shall live. Upon the death of my said daughter, the provisions herein for her benefit shall terminate and the Trustees shall distribute the remainder of this said trust to the lawful issue of her body.

2. The Trustees shall pay to my brother Frank F. Huesman, a sum of money equal to four per cent (4%) of the Trusteed Property, which said money shall be paid to my said brother in five (5) equal yearly installments. Should my said brother die before receiving distribution of the entire share herein provided to be paid to him, then such share or its undistributed remainder shall be paid to my nephew Fred B. Huesman, and if he be not then living, to my heirs at law in accordance with the laws of succession of the State of California.

3. The Trustees shall set aside twenty per cent (20%) of all the property distributed to them under the decree of distribution as a trust for the benefit of my brother Fred H. Huesman, and shall pay to him the entire net income from his trust as long as he shall live and upon his death this trust shall terminate and the principal and accumulations, if any, shall go and be distributed to his children as follows: three-fourths ($\frac{3}{4}$) to Fred B. Huesman

and one-fourth ($\frac{1}{4}$) to Mary Gerard Huesman, except that if either of said children shall die before distribution, the share that would otherwise have gone to said child shall be distributed to the lawful descendants of said child, and in the event there be no lawful descendants [23] then to my heirs at law in accordance with the laws of succession of the State of California.

4. The Trustees shall set aside twenty per cent (20%) of all the property distributed to them under the decree of distribution as a trust for the benefit of my sister Mathilda Josephine Huesman Doll, and shall pay to her the entire net income from her trust as long as she shall live, and upon her death this trust shall terminate and the principal and accumulations, if any, shall be distributed to her living, lawful descendants, per stirpes, and if she be not survived by any living lawful descendants, to my heirs at law in accordance with the laws of succession of the State of California. If upon my death my said sister Mathilda Josephine Huesman Doll shall not survive me, but living, lawful descendants of my said sister shall survive me, then upon my death twenty per cent (20%) of the Trusteed Property shall be distributed to the living, lawful descendants of my said sister per stirpes, and if there be no living, lawful descendants of my said sister, then to my heirs at law in accordance with the laws of succession of the State of California.

5. The Trustees shall pay and distribute a sum of money equal to sixteen per cent (16%) of the

Trusted Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); which said respective sums shall be distributed as soon as reasonably possible, and the balance of said sum of money shall be paid and distributed by [24] the Trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, four-tenths ($4/10$ ths); to Catholic Foreign Missions Society of America, Inc., one-tenth ($1/10$ th); to Little Sisters of the Poor, at present located at 2700 East First Street, Los Angeles, California, one-tenth ($1/10$ th); to St. Vincent's Hospital, at present located at Third and Alvarado Streets, Los Angeles, California, one-twentieth ($1/20$ th); to the Children's Hospital of Los Angeles, one-twentieth ($1/20$ th); and three-tenths ($3/10$ ths) to the Employees' Retirement Plan of Desmond's, a California corporation with its principal place of business at 616 South Broadway, Los Angeles, California, for the benefit of its employees, provided, however, that at the time of my death I am the owner of a majority of the capital stock of Desmond's, and provided further, that such Employees' Retirement Plan of Desmond's at such time is in existence, and said three-tenths shall be added to the share in said Employees' Retirement

Plan of Desmond's for the benefit of those persons in the employ of Desmond's prior to the effective date of said Employees' Retirement Plan of Desmond's and entitled to share thereunder. Such conversion of Trusteed Property into money and payments and distributions made to said organizations shall be made by the Trustees within five (5) years after distribution to the Trustees and shall be made at such times and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trust Estate, and the Trustees may exercise in their sole discretion as to when and in what amounts such conversions and payments and distribution shall be made within said period of five (5) years. If distribution cannot be made to any of the [25] organizations hereinabove named or for any reason any of the provisions in this paragraph shall become inoperative, then as to the portion and the percentage of such sum as to which it shall be inoperative, it shall be distributed by the Trustees to my nephew Fred B. Huesman, and if he be not then living but is survived by issue, to his issue, and if he be not survived by issue, then to my heirs at law in accordance with the laws of succession of the State of California. [26]

H. If at any time after my death there shall be no qualified recipients for any portion of the Trusteed Property to whom distribution can be made under the terms of this Will, then the portion of the Trusteed Property with respect to which there is such total failure of qualified recipients, shall be dis-

tributed to my heirs at law in accordance with the laws of succession of the State of California.

I. I have purposely neglected to make provision for the three sons of my brother Fred H. Huesman who have gone into the priesthood for the reason that in joining the priesthood they have taken vows of poverty.

J. It is not my intention necessarily to conserve the Trusteed Property for the use and benefit of the beneficiaries, or any of them, who ultimately may be entitled thereto by virtue of the foregoing provisions of this Will. On the contrary, my primary purpose is to provide for and protect my wife if she elects to take under the provisions of this Will, and my daughter in any event, and if my wife elects to take under this Will, and in any event with respect to my daughter, I direct that the Trustees in their uncontrolled discretion may at any time, and from time to time, pay to or expend and apply for the benefit of my wife for her support, care or comfort, and from time to time pay to or expend and apply for the benefit of my daughter for her support, care or comfort, such sums out of the principal of the Trusteed Property as the Trustees in their absolute discretion may deem advisable, and in the event of any such payment the amount thereof shall be charged against that part of the Trusteed Property from which such beneficiary is or may become entitled to receive the income, or against the trust of such beneficiary in the principal of the Trusteed [27] Property.

K. During the minority or other legal disability of any beneficiary to whom such payments of income, or payments of principal in the discretion of the Trustees, are herein directed to be made, the Trustees may make such payments in any one or more of the following ways: (1) directly to said beneficiary; or (2) to the legal guardian or conservator of said beneficiary. The Trustees shall not be required to see to the application of any such payment so made to any of said persons, but his or their receipts therefor shall be a full discharge for the Trustees.

L. Each beneficiary hereunder is hereby prohibited from anticipating, encumbering, assigning or in any other way alienating his or her interest in either principal or income, and is without power so to do, nor shall such interest be subject to his or her liabilities or obligations, nor to attachment, execution or other legal process, bankruptcy proceedings or claims of creditors or others. The Trustees may, however, deposit in any bank designated by a beneficiary, to his or her credit, income and/or principal payable to such beneficiary.

M. Upon the death of any beneficiary, any accrued and undistributed net income which would have been payable to such beneficiary had such beneficiary continued to live, shall be paid to the beneficiary who shall next be entitled upon the death of such deceased beneficiary to receive such income or the principal from which such income was derived.

N. The Trustees shall have full power and authority to hold, manage, insure, improve, repair and deal with all property, real or personal, at any time forming part of the Trusteed Property, to sell, contract to sell, convey, transfer, exchange, partition, lease for any term within or extending [28] beyond the duration of this trust, and to grant for like terms, the right to mine or drill for and remove therefrom gas, oil or other minerals; to create restrictions, easements or other servitudes thereon; to mortgage, pledge and otherwise dispose of the same or any interest therein, all in such manner, for such consideration and upon such terms and conditions as the Trustees in their discretion shall determine; to effect insurance, including public liability insurance, at the expense of the Trust Estate, of such nature and in such form and amount as the Trustees deem advisable; to employ such agents and counsel, including legal and investment counsel, as may be reasonably necessary or desirable in managing, protecting and investing the Trusteed Property, and to pay them reasonable compensation; to settle, compromise or abandon all claims and demands in favor of or against the Trusteed Property; to accept, add to, hold and retain as a part of the Trusteed Property, or any particular trust or portion thereof, any property of any kind or nature which may at any time be transferred, conveyed or delivered to the Trustees for such purposes by any persons; to borrow money, with or without security, for any purpose, either from any of the Trustees individually or from others; to assume the payments of and to

extend and renew any indebtedness incurred by me or by my Executors or Trustees, or secured by any property which may at any time form a part of the Trusteed Property; to invest and reinvest the Trusteed Property in any stocks, bonds, mortgages, notes or other securities or property of any kind or nature, real or personal, notwithstanding such investments may not be prescribed by law or rule of court for the investment of trust funds, and to change such investments; to buy, sell, hold and otherwise deal in any and all commodities of every kind and description whatsoever; to vote any corporate stock either in person or by proxy [29] for any purpose; to exercise any conversion privilege or subscription right given to the Trustees as the owners of any securities forming a part of the Trusteed Property; to consent to, take any action in connection with and receive and retain any securities resulting from any reorganization, consolidation, merger, liquidation, readjustment of the financial structure or sale of the assets of any corporation or other organization the securities of which may constitute a portion of the Trusteed Property, to cause any securities or other property which may at any time form a part of the Trusteed Property to be issued, held or registered in the individual names of any or all of the Trustees, or in the name of their nominee, or in such form that title will pass by delivery; provided that if at the time of my death I am the owner, either directly or indirectly or through other corporations or otherwise, of stock in the business now known as "Desmond's" I recommend that the Trustees sell and

dispose of the same and invest the proceeds of such sale or disposition in listed marketable securities; I recommend further that the Trustees first offer to sell such stock to the heads of the departments of the said business, or to such of them as are able to purchase the same, otherwise to dispose of it in such manner as the Trustees shall deem most advisable. The Trustees shall have full power and authority to determine what is principal of the Trusteed Property, gross income or net distributable income therefrom; except that all bonuses, royalties and recoveries from mines, gas or oil leases or wells, all stock dividends and proceeds of sale of stock rights, and all gain or loss which may result from payment, retirement of sale of stocks, notes, bonds or other securities or on foreclosure or other realization upon mortgages and trust deeds, shall inure to or fall upon principal, [30] and all cash dividends (other than liquidating dividends stated in writing to be such by the corporation paying the same or proved to the satisfaction of the Trustees to be such prior to their disbursement thereof) shall go to income of the Trusteed Property. The net income from real property acquired by the Trustees on, or by acceptance of conveyance in lieu of, foreclosure shall go to income of the Trusteed Property, brokers' or other commissions and expenses on purchase or sale of Trusteed Property shall be charged against principal. The Trustees may pay all premiums and assessments of any policy of insurance forming part of the Trusteed Property and exercise any option, privilege or benefit in connection with any such pol-

icy, including the right to surrender any such policy for a paid-up policy or for its cash surrender value, use any such policy as security for any purpose whatever, assign any such policy, change the manner in which and the persons to whom any such policy shall be payable at the maturity thereof, apply automatic loan provisions for the payment of premiums, and direct the payment of dividends thereon to be made in cash or to be applied toward the reduction of premiums.

O. All discretions in this Will conferred upon the Trustees shall, unless specifically limited, be absolute and their exercise conclusive on all beneficiaries hereunder. The enumeration of certain powers and discretions of the Trustees are not to be construed as limiting their general powers and discretions, the Trustees being hereby vested with and having as to the Trusteed Property all the powers and discretions that an absolute owner of property has or may have.

P. If my wife shall elect to take under the provisions of this Will, then and in that event only, I expressly direct [31] that prior to any investment the Trustees must first consult my wife, Nurma W. Huesman, so long as she shall live, and in the event she objects to any certain investments the Trustees must seek a new and different investment until they shall find an investment that is approved by my said wife; in all other matters relating to the Trusteed Property, if at any time the Trustees shall disagree in any matter relating to the Trusteed Property, the

decision of the corporate trustee and one individual trustee shall be required in any matter or transaction, and shall be valid and binding as if all the Trustees had joined therein.

Q. No person dealing with the Trustees in any manner shall be under any obligation to see to the application of any money paid to the Trustees, or to inquire into the validity, expediency or propriety of any act of the Trustee, or into any of the provisions of this Will.

R. The Trustees shall be reimbursed out of said Trusteed Property for all reasonable expenses incurred in the management and protection thereof and the Trustees shall be paid a fair and just compensation out of the Trusteed Property for their services hereunder.

Article VI.

In making division of the Trusteed Property into separate trusts pursuant to the provisions of paragraphs B, C, D, E, F and G of Article V of this Will, as the case may be, the Trustees may assign to the several trusts any property of the Trusteed Property in kind or any undivided interest therein. A separate account shall be kept by the Trustees of each of said trusts and the investments in each of said separate trusts shall at all times be kept the same as near as may be, and to [32] that end joint investments may be made by the Trustees on behalf of said separate trusts. In making any distribution pursuant to this Will, the Trustees may distribute in kind any property of the Trusteed Property or

any undivided interest therein. The judgment of the Trustees respecting the value of any property assigned to the several trusts or distributed in kind shall be binding and conclusive on all beneficiaries hereunder.

Article VII.

(a) I nominate and appoint my nephew Fred B. Huesman and Marcellus Doll, and the Farmers & Merchants National Bank of Los Angeles, California, as Trustees under this Will, except that if my wife, Nurma W. Huesman, shall elect to take under the provisions of this Will, then the Trustees shall be my said wife, my nephew Fred B. Huesman and Farmers & Merchants National Bank of Los Angeles, California. In the event of the death, resignation, refusal or incapacity to act of both of said individual Trustees and all successor individual Trustees appointed under the provisions of this Will, before the termination of all the trusts hereby created, then the corporate Trustee shall thereafter be the sole Trustee hereunder with all the powers, authorities and discretions herein given to the original Trustees jointly, until such time as one or more successor individual Trustees are appointed.

(b) In the event that the corporate Trustee at any time acting hereunder shall be merged with or consolidated with or shall sell or transfer substantially all of its assets and business to another corporation, state or federal, or shall be in any manner reorganized, or reincorporated, then the corporation resulting from such merger, consolidation, reorgan-

ization [33] or reincorporation, or the corporation to which such sale or transfer shall be made, shall thereupon become and be a Trustee hereunder without the execution of any instrument and without any further action on the part of any of the Trustees or beneficiaries hereunder.

(c) The corporate Trustee at any time acting hereunder may resign at any time by giving at least two months prior written notice of such resignation to all the individual Trustees then acting hereunder; but any such resignation may take effect before the expiration of such two months period by agreement of all the Trustees then acting hereunder. The individual Trustees or one individual Trustee if there be only one, at any time acting hereunder shall have the power at any time and from time to time, by a written instrument signed by such Trustees or Trustee, to remove the corporate Trustee then acting hereunder. In the event of the resignation, removal, refusal or inability to act of the corporate Trustee at any time, the individual Trustees or Trustee then acting hereunder must, by a written instrument signed by them, appoint as successor corporate Trustee hereunder a bank or trust company. Upon such appointment of such successor corporate Trustee, the retiring corporate Trustee shall convey, assign and deliver to such successor corporate Trustee, all property then held in trust hereunder, and the receipt of such successor corporate Trustee shall be a full and complete acquittance and discharge to such retiring Trustee.

(d) Any individual Trustee hereunder shall have

the power at any time, by a written instrument signed by him or her, to resign as a Trustee hereunder and to appoint as successor individual Trustee any person whom he or she may select. In [34] the event that any individual Trustee hereunder shall at any time die, resign or become incapable of acting hereunder, without having appointed a successor Trustee, then the other individual Trustee then acting hereunder may, by an instrument in writing signed by him or her, appoint a successor individual Trustee to fill such vacancy.

(e) It is my intention that as far as practicable there shall at all times be two individual Trustees and one corporate Trustee acting hereunder, but during the vacancy in the office of any Trustee hereunder, irrespective of how long such vacancy shall continue, the remaining Trustees or Trustee hereunder shall have and exercise all the powers, authorities and discretions given herein to all the Trustees.

(f) The corporate trustee shall at all times be entitled to and have custody and possession of all the property and assets of the trusts created herein and shall keep records and books of account wherein all the assets of the trust and all transactions with respect thereto shall be reflected. Such records and books of account shall be delivered to each succeeding corporate trustee. The individual trustee shall at all reasonable times have access to such records and books of account and may make copies of the whole or such portions thereof as they may from time to time require. The legal title to all property held in trust hereunder shall be and remain vested in the

Trustees and successor Trustees, individual and corporate, from time to time acting hereunder, without any act of conveyance or transfer to, by or from any succeeding or retiring Trustee, and the Trustees or Trustee, and successor Trustees or Trustee from time to time acting hereunder, shall have all the rights, powers and authorities, discretionary or otherwise, [35] herein granted to the original Trustees jointly. No successor Trustee shall be obliged to inquire into or be in any way accountable for the previous administration of the Trusteed Property.

(g) I expressly direct that no Trustee hereunder shall be required to give any bond or security for the proper discharge of his, her or its duties hereunder, nor shall any Trustee hereunder ever be liable for any act or default of any co-trustee or predecessor Trustee, nor for any loss sustained by any trust created hereunder or by any beneficiaries or beneficiary thereof through any error of judgment, but only for his, her or its own willful default.

Article VIII.

In the event that any provision or provisions of this Will are, or are adjudged to be, for any reason, unenforceable, I direct that, disregarding such, the remaining provisions hereof shall subsist and be carried into effect.

Article IX.

(a) I nominate and appoint as Executors of this Will my nephew Fred B. Huesman, my nephew

Marcellus Doll and the Farmers & Merchants National Bank of Los Angeles, California, or such of them as shall qualify, and in the event of the death, resignation, refusal or inability to act of any of them, the others or other of them shall act alone, except that if my wife shall elect to take under this Will then I nominate her as an executrix in the place of my said nephew Marcellus Doll. My Executors are authorized to lease, encumber and sell property from my estate subject to such confirmation as may be required by law and the Executors may continue to hold, manage and operate any property and subject to court approval any business [36] belonging to my estate. The bank shall have physical possession and custody of the property of my estate, subject to the right of the co-Executors to have access to it at all reasonable times, and may make all disbursements.

(b) I expressly direct that no Executor hereunder shall be required to give any bond or security for the proper discharge of his, her or its duties hereunder.

In Witness Whereof, I have hereunto set my hand and seal to this my Last Will and Testament, consisting of thirty-seven (37) typewritten pages, including the page signed by the witnesses, on the left hand margin of each of which I have placed my signature for greater security and better identification this 4th day of April, A.D. 1944.

[Seal]

RALPH R. HUESMAN,
(Christened as Raphael R.
Huesman.)

The foregoing instrument, consisting of thirty-seven (37) typewritten pages, this included, each page thereof bearing on its left hand margin the signature of the Testator, was on this 4th day of April, 1944, signed, sealed, published and declared by the said Testator as and for his Last Will and Testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto, we and each of us believing that the Testator was at the time of the execution of this, his Last Will and Testament, of sound and disposing mind and memory and was not influenced by any person whomsoever and was at the time hereof, cognizant of any and all persons who had any right or claim upon him.

/s/ LEONORE M. ZINNER,

Residing at: 1604 Fremont So. Pasadena Calif.

/s/ ARTHUR ROOT,

Residing at: 6143 Santa Fe Ave Huntington Park Calif.

/s/ JOHN R. SCANILIN,

Residing at: 122 N Anita Ave. L. A. Calif. [37]

EXHIBIT B

No. 233,009

ESTATE OF RALPH R. HUESMAN,

Deceased.

In the Matter of

The Estate of RALPH R. HUESMAN,

Deceased.

PETITION FOR INSTRUCTIONS TO
TESTAMENTARY TRUSTEES

To the Above-Entitled Superior Court:

The petition of Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, respectfully shows that:

I.

Petitioners are the duly appointed, qualified and acting Executors under the Will of Ralph R. Huesman, deceased.

Petitioners are the Trustees named in said Will of Ralph R. Huesman, deceased; and petitioners have accepted, and hereby do accept the Trust created and declared therein.

II.

The estate has been appraised by an Inheritance Tax Appraiser in the sum of \$3,749,196.98, as shown by the inventory and appraisement on file herein.

III.

The first Notice to Creditors was published on

June 21, 1944, and the time for filing claims has expired. Claims and indebtedness against the estate for ordinary executors and attorneys fees and commissions will amount to approximately \$150,000.00.

IV.

The net value of the estate available for the payment of taxes and legacies and other charges is approximately \$3,599,000.00.

V.

Among the assets of the Estate of Ralph R. Huesman, deceased, and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond's, a corporation, in the sum of \$80,517.00.

VI.

Among the claims filed and allowed is that of Desmond's, a corporation, which has been allowed in the sum of \$30,562.06, representing the balance of mutual accounts between Desmond's and the decedent, as follows:

Promissory note due Desmond's.....	\$ 80,283.30
Interest on note to date of death.....	3,231.20
Advances on open account.....	27,094.51

Total due Desmond's at date of death.	110,690.01
Plus Additional interest on note to date of claim	470.05

Total due Desmond's at date of claim. 111,079.06

Less Compensation due decedent in form

of bonus at date of death.....\$ 80,517.00

Net amount due Desmond's and al-

lowed as a claim.....\$ 30,562.06

VII.

Under a Petition for Order to Borrow Money on Unsecured Note, filed herewith, the executors propose to pay to Desmond's the full amount of decedent's aforesaid indebtedness plus interest, in the total sum of \$111,079.06; and to receive from Desmond's the sum of \$80,517.00 specifically as compensation due to the decedent in the form of a bonus at the time of his death. As a result of said mutual payments, Desmond's claim against the estate will thereby be fully paid; and the amount of \$80,517.00 received specifically as compensation due to the decedent in the form of a bonus at the time of his death shall become available to the Executors for distribution.

VIII.

By the terms of the Will the net estate, being in excess of \$250,000.00, is to be distributed to your petitioning Trustees. Of the total net estate approximately 60% is to be held in trust for the lives of Nurma W. Huesman and Carol Ann Huesman Marcato; and the balance is to be distributed to certain named beneficiaries within a period of five years after distribution to Trustees. One of said beneficiaries is Loyola University of Los Angeles,

Regents' Fund, which is entitled to a sum of money equal to approximately 5% of the Truited property, amounting to approximately \$98,000.00.

IX.

Loyola University is an educational institution located in Los Angeles, California. Said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent's will in the amount of said bonus, to wit, the sum of \$80,517.00.

X.

No Inheritance Taxes due to the State of California have been determined or paid; but the bequest made for the benefit of Loyola University is not subject to said California Inheritance Tax by reason of the fact that said Loyola University is an educational institution which is exempt from said California Inheritance Tax. Written consent of the State Controller to the proposed distribution is filed herewith.

XI.

Under a petition for partial distribution, filed herewith, the Executors have requested that the Court make an order requiring and directing that the Executors receiving said sum of \$80,517.00 from Desmond's specifically as compensation due to decedent in the form of a bonus at the time of his death, shall deliver said specific sum to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trus-

tees under the Will of Ralph R. Huesman, deceased, for the purpose of making immediate distribution of said specific sum to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, deceased.

XII.

Upon the granting of said Order by the Court, and distribution of said sum in accordance therewith by the Executors, said sum of \$80,517.00 received from Desmond's specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall become the sole estate of said Testamentary Trust. There will be no liabilities to any creditors under said Trust. The said legacy or share of the estate set forth above may be distributed to Loyola University, Regents' Fund, as the institution entitled thereto, without loss to the creditors or injury to the Trust Estate, or any person interested therein. The State Controller has, in writing, consented to said distribution. The Trustees deem it unnecessary that the legatee give a bond and request that such bond be dispensed with.

XIII.

The heirs at law of said deceased are:

Name: Nurma W. Huesman.

Age: Adult.

Residence (Street and City): 10811 Ambazac
Way, Bel Air, Los Angeles 24, California.

Name: Carrol Ann Huesman Marcato.

Age: Adult.

Residence (Street and City): 24 East 82nd St., New York City, N. Y.

The legatees and devisees are:

Name, Nurma W. Huesman; age, adult; residence (street and city), 10811 Ambazac Way, Bel Air, Los Angeles 24, California.

Name, Carrol Ann Huesman Marcato; age, adult; residence (street and city), 24 East 82nd St., New York City, N. Y.

Name, Fred H. Huesman; age, adult; residence (street and city), 728 E. Windsor Rd., Glendale, Calif.

Name, Mathilda Josephine Huesman Doll; age, adult; residence (street and city), 1219 Viscano Dr., Glendale, Calif.

Name, Frank F. Huesman; age, adult; residence (street and city), 915 E. Lomita Ave., Glendale, Calif.

Name, Fred B. Huesman; age, adult; residence (street and city), 616 So. Broadway, Los Angeles, Calif.

Name, Marcellus Doll; age, adult; residence (street and city), 714 N. Linden Dr., Beverly Hills, Calif.

Name, Mary Gerard Huesman; age, adult; residence (street and city), 728 E. Windsor Rd. Glendale, Calif.

Name, Dr. Henry M. Rooney; age, adult; residence (street and city), 832 S. Windsor Rd., Los Angeles, Calif.

Name, Mrs. May Rooney; age, adult; residence (street and city), 832 S. Windsor Rd., Los Angeles, Calif.

Name, Leonora Zinner; age, adult; residence (street and city), 1604 Fremont Ave., South Pasadena, Calif.

Name, Mrs. Gregory Haran; age adult; residence (street and city), 456 Redwood Road, Box #456, Corte Madera, California.

Name, Loyola University of Los Angeles; residence (street and city), 7101 W. 80th St., Los Angeles, Calif.

Name, Employees' Retirement Plan of Desmond's; residence (street and city), 616 So. Broadway, Los Angeles, Calif.

XIV.

Wherefore, Petitioners pray that the Clerk shall set this petition for hearing by the Court; that notice of the time and place fixed for such hearing shall be given in the manner required by law; that the Court make an order instructing, requiring and directing that said sum of \$80,517.00, received by the Executors from Desmond's specifically as compensation due to the decedent in the form of a bonus at the time of his death, and delivered, under Order of the Court, as a specific sum to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees

under the Will of Ralph R. Huesman, deceased, for the purpose of making immediate distribution of said specific sum to Loyola University of Los Angeles, Regents' Fund in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, deceased; shall be delivered as a specific sum to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, deceased; that the Court order that no bond shall be required by reason of any decree of partial distribution granted hereunder; and that the Court make any and all other necessary and proper orders that may be required in the premises.

Dated: April 6, 1945.

.....,

Nurma W. Huesman,

FARMERS AND MERCHANTS NATIONAL
BANK OF LOS ANGELES,

By R. G. LEMMON,

Assistant Trust Officer.

.....

Neil S. McCarthy,

Attorney for Petitioners.

State of California,

County of Los Angeles—ss.

Nurma W. Huesman, being sworn, says: That she is one of the petitioners in the above-entitled action;

that she has read the foregoing petition and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

NURMA W. HUESMAN.

Subscribed and sworn to before me on April 6, 1945.

MELBA S. DEEMING,
Notary Public in and for
Said County and State.

State of California,
County of Los Angeles—ss.

R. G. Lemmon, being sworn, says: That he is the Assistant Trust Officer of the Farmers and Merchants National Bank of Los Angeles, a national banking association, one of the petitioners in the above-entitled action, and that he is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

R. G. LEMMON.

Subscribed and sworn to before me on April 6, 1945.

G. F. BIETSCH,
Notary Public in and for
Said County and State.

EXHIBIT C

No. 233,009

Estate of RALPH R. HUESMAN,

Deceased.

In the Matter of

The Estate of RALPH R. HUESMAN,

Deceased.

PETITION FOR PARTIAL
DISTRIBUTION

To the Above-Entitled Superior Court:

The petition of Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, respectfully shows that:

I.

Petitioners are the duly appointed, qualified and acting executors under the Will of Ralph R. Huesman, deceased, and are the trustees named in said Will to whom the property will be distributed in this proceeding as trustees, and join in this petition as such executors and trustees.

II.

The estate has been appraised by an Inheritance Tax Appraiser in the sum of \$3,749,196.98, as shown by the inventory and appraisal on file herein.

III.

The first Notice to Creditors was published on June 21, 1944, and the time for filing claims has

expired. Claims and indebtedness against the estate for ordinary executors and attorneys fees and commissions will amount to approximately \$150,000.00.

IV.

The net value of the estate available for the payment of taxes and legacies and other charges is approximately \$3,599,000.00.

V.

Among the assets of the Estate of Ralph R. Huesman, deceased, and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond's, a corporation, in the sum of \$80,517.00.

VI.

Among the claims filed and allowed is that of Desmond's, a corporation, which has been allowed in the sum of \$30,562.06, representing the balance of mutual accounts between Desmond's and the decedent, as follows:

Promissory note due Desmond's.....	\$ 80,283.30
Interest on note to date of death.....	3,231.20
Advances on open account	27,094.51

Total due Desmond's at date of death.	110,609.01
Plus additional interest on note to date of claim	470.05

Total due Desmond's at date of claim. 111,079.06

Less compensation due decedent in form
of bonus at date of death..... 80,517.00

Net amount due Desmond's and al-
lowed as a claim\$ 30,562.06

VII.

Under a Petition for Order to Borrow on Unsecured Note, filed herewith, the executors propose to pay to Desmond's the full amount of decedent's aforesaid indebtedness plus interest, in the total sum of \$111,079.06; and to receive from Desmond's the sum of \$80,517.00 specifically as compensation due to the decedent in the form of a bonus at the time of his death. As a result of said mutual payments, Desmond's claim against the estate will thereby be fully paid; and the amount of \$80,517.00 received specifically as compensation due to the decedent in the form of a bonus at the time of his death shall become available for distribution.

VIII.

By the terms of the Will the net estate, being in excess of \$250,000.00, is to be distributed to Trustees, who are the same persons as your petitioning executors. Of the total net estate approximately 60% is to be held in trust for the lives of Nurma W. Huesman and Carol Ann Huesman Marcato; and the balance is to be distributed to certain named beneficiaries within a period of five years after distribution to trustees. One of said beneficiaries is Loyola University of Los Angeles, Regents'

Fund, which is entitled to a sum of money equal to approximately 5% of the Trusteed Property, amounting to approximately \$98,000.00.

IX.

Loyola University is an educational institution located in Los Angeles, California. Said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent's will in the amount of said bonus, to wit, the sum of \$80,517.00.

X.

No Inheritance Taxes due to the State of California have been determined or paid; but the bequest made for the benefit of Loyola University is not subject to said California Inheritance Tax by reason of the fact that said Loyola University is an educational institution which is exempt from said California Inheritance Tax. Written consent of the State Controller to the proposed distribution is filed herewith.

XI.

The Estate is but little indebted. The State Controller has in writing consented to said distribution. The legacy or share of the Estate set forth above may be distributed to Loyola University, Regents' Fund, as the institution entitled thereto without loss to the creditors or injury to the Estate or any person interested therein. Sufficient assets will remain in the hands of the executors to pay all debts of administration. The executors deem it un-

necessary that the legatee give a bond and request that such bond be dispensed with.

XII.

The heirs at law of said deceased are:

Name: Nurma W. Huesman.

Age: Adult.

Residence (Street and City): 10811 Ambazac Way, Bel Air, Los Angeles 24, California.

Name: Carol Ann Huesman Marcato.

Age: Adult.

Residence (Street and City): 24 East 82nd St., New York City, N. Y.

The legatees and devisees are:

Name, Nurma W. Huesman; age, adult; residence (street and city), 10811 Ambazac Way, Bel Air, Los Angeles 24, California.

Name, Carol Ann Huesman Marcato; age, adult; residence (street and city), 24 East 82nd St., New York City, N. Y.

Name, Fred H. Huesman; age, adult; residence (street and city), 728 E. Windsor Rd., Glendale, Calif.

Name, Mathilda Josephine Huesman Doll; age, adult; residence (street and city), 1219 Viscano Dr., Glendale, Calif.

Name, Frank F. Huesman; age, adult; residence (street and city), 915 E. Lomita Ave., Glendale, Calif.

Name, Fred B. Huesman; age, adult; residence (street and city), 616 So. Broadway, Los Angeles, Calif.

Name, Marcellus Doll; age, adult; residence (street and city), 714 N. Linden Dr., Beverly Hills, Calif.

Name, Mary Gerard Huesman; age, adult; residence (street and city), 728 E. Windsor Rd., Glendale, Calif.

Name, Dr. Henry M. Rooney; age, adult; residence (street and city), 832 So. Windsor Rd., Los Angeles, Calif.

Name, Mrs. May Rooney; age, adult; residence (street and city), 832 S. Windsor Rd., Los Angeles, Calif.

Name, Leonora Zinner; age, adult; residence (street and city), 1604 Fremont Ave., South Pasadena, Calif.

Name, Mrs. Gregory Haran; age, adult; residence (street and city), 456 Redwood Road, Box #456, Corte Madera, California.

Name, Loyola University of Los Angeles; residence (street and city), 7101 W. 80th St., Los Angeles, Calif.

Name, Employees' Betirement Plan of Desmond's; residence (street and city), 616 So. Broadway, Los Angeles, Calif.

XIII.

Wherefore, Petitioners pray that the clerk shall set this petition for hearing by the Court; that

notice of the time and place fixed for such hearing shall be given in the manner required by law; that the Court make an order requiring and directing that the executors receiving said sum of \$80,517.00 from Desmond's specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall deliver said specific sum to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, deceased, for the purpose of making immediate distribution of said specific sum to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, deceased; that the Court order that no bond shall be required by reason of any decree of partial distribution granted hereunder; and that the Court make any and all other necessary and proper orders that may be required in the premises.

Dated: April 6, 1945.

/s/ NURMA W. HUESMAN.

FARMERS AND MERCHANTS NATIONAL
BANK OF LOS ANGELES,

By R. G. LEMMON,
Assistant Trust Officer.

/s/ NEIL S. McCARTHY,
Attorney for Petitioners.

State of California,
County of Los Angeles—ss.

Nurma W. Huesman, being sworn, says: That she is one of the petitioners in the above-entitled action; that she has read the foregoing petition and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

NURMA W. HUESMAN.

Subscribed and sworn to before me on April 6, 1945.

MELBA S. DEEMING,
Notary Public in and for
Said County and State.

State of California,
County of Los Angeles—ss.

R. G. Lemmon, being sworn, says: That he is the Assistant Trust Officer of the Farmers and Merchants National Bank of Los Angeles, a national banking association, one of the petitioners in the above-entitled action, and that he is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information

or belief, and as to those matters he believes it to be true.

R. G. LEMMON.

Subscribed and sworn to before me on April 6, 1945.

G. F. BIETSCH,
Notary Public in and for
Said County and State.

EXHIBIT D

In the Superior Court in the State of California
in and for the County of Los Angeles

No. 233,009

In the Matter of
The Estate of RALPH R. HUESMAN,
Deceased.

ORDER INSTRUCTING TESTAMENTARY
TRUSTEES TO MAKE PARTIAL DIS-
TRIBUTION

Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, being the Executors under the Will of Ralph R. Huesman, Deceased, and also being the persons named as Trustees in said Will of Ralph R. Huesman, Deceased, having filed herein on the 10th day of April 1945, their petition praying for an order instructing, requiring and directing that a certain sum of Eighty Thousand Five Hundred

Seventeen Dollars (\$80,517.00) should be distributed to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under Will of Ralph R. Huesman, Deceased, and said petition this day coming on regularly to be heard; proof having been made to the satisfaction of the Court, the Court finds that notice of hearing on said petition has been regularly given for the period and in the manner required by it under Sections 1120 and 1200 of the Probate Code; and no person appearing to contest the same;

The Court after hearing the evidence, finds that all the allegations of said petition are true; that Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, are the Trustees appointed by the Will of Ralph R. Huesman, Deceased; that said persons have accepted the trusts created and declared in said Will; that among the assets of said Estate and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond's, a corporation, in the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00); that among the claims filed and allowed is that of Desmond's, a corporation, amounting in gross to One Hundred Eleven Thousand Seventy-nine 6/100 Dollars (\$111,079.06); that under an order authorizing said Executors to borrow money on an unsecured note, granted by this Court on this day, the Executors will borrow One Hundred Ten Thousand Dollars (\$110,000.00) and pay to Desmond's, a corporation, the full amount

of decedent's aforesaid indebtedness plus interest in the total amount of One Hundred Eleven Thousand Seventy-nine 6/100 Dollars (\$111,079.06) and will receive from Desmond's, the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00), specifically as compensation due to the decedent in the form of a bonus at the time of his death; that as a result of said mutual payments, Desmond's claim against the Estate will thereby be fully paid; and the amount of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) received specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall become available for distribution;

That by the terms of the Will, the net estate, being in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00), is to be distributed to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; that one of the beneficiaries of said testamentary trust is Loyola University of Los Angeles, Regents' Fund, which is entitled to a sum of money equal to approximately Five Per cent (5%) of the trusteed property, amounting to approximately Ninety Eight Thousand Dollars (\$98,000.00); that said Loyola University is an educational institution located in Los Angeles, California; that said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent's Will in the amount of said bonus, to wit, the sum of Eighty Thousand Five

Hundred Seventeen Dollars (\$80,517.00); that the State Comptroller through the Assistant Inheritance Tax Attorneys, has consented to the granting of the petition for partial distribution, without first having the California Inheritance Taxes determined and paid;

That under an order and decree of partial distribution granted by this Court on this day, the Executors, upon receiving said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from Desmond's, a corporation, specifically as compensation due the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; that said sum constitutes the sole estate of said testamentary trust; that there are no liabilities to any creditors under said trust; that the said legacy or share of the trust estate set forth above may be distributed to Loyola University, Regents' Fund, as the institution entitled thereto, without loss to the creditors or injury to the trust estate, or any person interested therein; and that it is unnecessary that the legatee give bond.

It Is Therefore Ordered and Decreed that the said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) received by Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Ex-

ecutors of the Estate of Ralph R. Huesman, Deceased, from Desmond's, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, and delivered under order of this Court, as a specific sum to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased, shall be delivered as a specific sum to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution granted hereunder.

Done in open Court this 30th day of April, 1945.

NEWCOMB CONDEE,

Judge of the Superior Court.

EXHIBIT E

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 233,009

In the Matter of

The Estate of RALPH R. HUESMAN,

Deceased.

ORDER AND DECREE OF PARTIAL DISTRIBUTION

Nurma W. Huesman, Fred B. Huesman and
Farmers and Merchants National Bank of Los An-

geles, Executors under the Will of Ralph R. Huesman, Deceased, having filed herein on the 10th day of April, 1945, their petition and Supplement to Petition praying for an order allowing and distributing to themselves as Trustees under the Will of Ralph R. Huesman, Deceased, a certain portion of said Estate to which the Trustees are entitled under the terms of the Will, and directing said executors to deliver said property to themselves as said Trustees, and further directing said Trustees to deliver said property to Loyola University, Regents' Fund, as the ultimate beneficiary of said property under said trust; and said petition this day coming on regularly to be heard; proof having been made to the satisfaction of the Court, the Court finds that notice of the hearing of said petition has been regularly given for the period and in the manner required by Section 1200 of the Probate Code; and no person appearing to contest the same;

The Court, after hearing the evidence, finds that all the allegations of said petition and Supplement to Petition are true; that among the assets of said Estate and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond's, a corporation, in the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00); that among the claims filed and allowed is that of Desmond's, a corporation, amounting in gross to One Hundred Eleven Thousand Seventy-nine 6/100 Dollars (\$111,079.06); that under an order authorizing said Executors to borrow money on an unsecured note, granted by this Court

on this day, the Executors will pay to Desmond's, a corporation, the full amount of decedent's aforesaid indebtedness plus interest in the total amount of One Hundred Eleven Thousand Seventy-nine 6/100 Dollars (\$111,079.06) and will receive from Desmond's, the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00), specifically as compensation due to the decedent in the form of a bonus at the time of his death; that as a result of said mutual payments, Desmond's claim against the Estate will thereby be fully paid; and the amount of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) received specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall become available for distribution;

That by the terms of the Will, the net estate, being in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00), is to be distributed to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as trustees under said Will of Ralph R. Huesman, Deceased; that one of the beneficiaries of said testamentary trust in Loyola University of Los Angeles, Regents' Fund, which is entitled to a sum of money equal to approximately Five Percent (5%) of the trusteeed property, amounting to approximately Ninety Eight Thousand Dollars (\$98,000.00); that said Loyola University is an educational institution located in Los Angeles, California; that said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent's Will in

the amount of said bonus, to wit, the sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00); that the State Comptroller through the assistant Inheritance Tax Attorneys, has consented to the granting of the petition for partial distribution, without first having the California Inheritance Taxes determined and paid; that the Estate is but little indebted; that the legacy or share of the Estate set forth above may be distributed to said Trustees and then to Loyola University, Regents' Fund, as the institution ultimately entitled thereto, without loss to the creditors or injury to the Estate or any person interested therein; that sufficient assets will remain in the hands of the Executors to pay any debts of administration; that it is unnecessary that the legatee give a bond;

It is Therefore Ordered and Decreed that Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Executors of the Estate of Ralph R. Huesman, Deceased, upon receiving said certain sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from Desmond's, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; and said Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as said

Trustees under the Will of Ralph R. Huesman, Deceased, shall distribute said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution order herein made.

Done in open Court this 30th day of April, 1945.

NEWCOMB CONDEE,
Judge of the Superior Court.

EXHIBIT F

Form 1041
Treasury Department
Internal Revenue Service

1944

United States
Fiduciary Income Tax Return
(For Estates and Trusts)

For Calendar Year 1944
or fiscal year beginning May 1, 1944, and ending April 30, 1945.

(File this return with Collector of Internal Revenue not later than the 15th day of the third month following the close of the taxable year.)

(Print Names and Address Plainly Below)

Name of Estate or Trust: Estate of Ralph R. Huesman, Deceased.
Estate X.

Nurma W. Huesman,
10811 Ambazac Way, W. Los Angeles, California.

Name and Address of Fiduciary:

Fred B. Huesman,
616 S. Broadway, Los Angeles, California.

Farmers & Merchants Nat'l Bank,
401 S. Main, Los Angeles 54, California.

Item and Instruction No.	Income
1. Dividends	\$ 50,465.00
2. Interest on bank deposits, notes, corporation bonds, etc. (except interest to be reported in item 3)	16.35
4. Interest on Government obligations, etc.: (b) Subject to normal tax and surtax (from Schedule B, line (i)).....	141.78
9. Other income. (State nature of income).....	80,517.00
10. Total income in items 1 to 9.....	<u>\$131,140.13</u>

Deductions

11. Interest. (Explain in Schedule H).....	\$ 3,701.25
12. Taxes. (Explain in Schedule H).....	2,250.77
13. Other deductions authorized by law. (Explain in Schedule H) I.R.C. 126 (Schedule).....	37,359.89
14. Total deductions in items 11 to 13.....	<u>\$ 43,311.91</u>
15. Balance (item 10 less item 14).....	\$ 87,828.22
16. Less: Amount distributable to beneficiaries (total of column 2, Schedule A, plus line (f), column 2a, Schedule B).....	80,517.00
17. Net income (taxable to fiduciary) (item 15 less item 16)	<u>7,311.22</u>

Computation of Tax

18. Net income (item 17, above).....	\$ 7,311.22
19. Less: Exemption (\$500 for an estate; \$100 for a trust)	500.00
20. Balance (surtax net income) (item 18 less item 19)	6,811.22
22. Balance subject to normal tax (item 20 less item 21)	6,811.22
23. Surtax on item 20. (Use Surtax Table in Instruc- tion 23)	1,603.37
24. Normal tax (3% of item 22).....	204.34
25. Total Income Tax (item 23 plus item 24) (or line 14, Schedule E).....	1,807.71
28. Balance of Income Tax.....	1,807.71

Schedule A.—Beneficiaries' Shares of Income and Credits

(Include as beneficiaries persons to whom amounts were paid or set aside for religious, charitable, etc., purposes.) (See Instructions 4 and 16.)

1. Name and address of each beneficiary
(Designate nonresident aliens, if any)

2. Taxable income
exclusive of (a) interest on Government obligations subject to surtax only and (b) dividends to be reported in column 8.

Nurma W. Huesman, Fred B. Huesman and Farmers & Merchants Nat'l Bank as Trustees under the Will of Ralph R. Huesman, Dec'd, Los Angeles, California.....	\$80,517.00
Totals	\$80,517.00

Schedule B.—Interest on Government Obligations, Etc.

(See Instruction 4)

Subject to Normal Tax and Surtax

Interest received or accrued
during the year

(g) Treasury Notes issued on or after Dec. 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof	\$141.78
(i) Balance of Interest (Enter as Item 4(b) Page 1).....	\$141.78

Schedule C.—Blank

Schedule D.—Blank

Schedule E.—Blank

Schedule F.—Blank

Schedule G.—Blank

Schedule H.—Blank

Questions

1. Was an income tax return filed for the preceding year? Yes. If so, to which collector's office was it sent? Decedent's return 6th Calif.
2. Date estate or trust was created: May 3, 1944.
3. If copy of will or trust instrument and statement required under General Instruction I have been previously furnished, state when and where filed: with Fed. Estate Tax return.
4. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.

5. Did the estate or trust at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No.") No. If answer is "Yes," attach list showing name and address of each such corporation and amount of stockholdings.
6. If return is for a trust, state name and address of grantor
7. If return is for an estate, has a United States Estate Tax Return been filed? (Answer "Yes" or "No.") No. If answer is "No," will such a return be filed? "Yes" ☒ "No" ☐ "Uncertain" ☐ (Check which.)

Affidavit (See Instruction F)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return.

W. D. BAKER,

(Signature of fiduciary or officer representing fiduciary.)

FRANCIS J. McENTEE,

(Signature of person (other than taxpayer or agent) preparing return.)

DEMPSEY, THAYER, DEIBERT &
KUMLER,

(Name of firm or employer, if any.)

Subscribed and sworn to before me this 11th day of July, 1945.

MELBA S. DEEMING,

(Signature of officer administering oath.)

Filed July 12, 1945.

Estate of Ralph R. Huesman, Deceased

To the Commissioner of Internal Revenue:

**ELECTION TO CLAIM CERTAIN EXPENSES
PAID BY EXECUTORS AS INCOME TAX
DEDUCTIONS IN LIEU OF DEDUCTIONS
FOR ESTATE TAX PURPOSES**

The undersigned Executors are, under the provisions of Section 126 of the Internal Revenue Code, claiming as deductions in the income tax return filed herewith for the Estate of Ralph R. Huesman, Deceased, the interest and taxes paid by the executors in respect of the decedent which were not properly allowable to the decedent in respect of the taxable period in which fell the date of his death or a prior period, and by making this election said Executors hereby waive the right to have such items allowed at any time as deductions from the gross estate for Federal Estate tax purposes. Such waiver is in conformity with the provisions of Section 162 (e) of said Code.

Dated: July 10, 1945.

**THE FARMERS & MERCHANTS NATIONAL
BANK OF L. A.**

By,
Co-executor.

\$250,000, the provisions of the will involved in the instant case are as follows:

Article V.

I give, devise and bequeath all the rest, residue, and remainder of my estate, real, personal and mixed, of every kind and nature and wherever situated, which I may own at the time of my death, and all other property over which I may have any power of disposition (all of said property being hereinafter referred to as the "Trusted Property"), to the Trustees hereinafter named, to have and to hold upon the following trusts and conditions:

E * * *

5. The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusted Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); * * * and the balance of said sum of money shall be paid and distributed by the Trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths (5/10th); * * *. Such conversion of Trusted Property into money and pay-

ments and distributions made to said organizations shall be made by the Trustees within five (5) years after distribution to the Trustees and shall be made at such time and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trust Estate, and the Trustees may exercise in their sole discretion as to when and in what amounts such payments and distributions shall be made within said period of five (5) years. * * *

At the time of his death, decedent was president of Desmond's, a retail merchandising corporation carrying on business in southern California. There was due and owing decedent from Desmond's at the time of his death, the sum of \$80,517 as a bonus for services rendered by him prior to his death. This amount was included in the Federal estate tax return as part of the gross estate under section 811 of the Internal Revenue Code, as the value of decedent's claim against Desmond's.

On April 10, 1945, the executors of the petitioner estate, in that capacity and their capacity as testamentary trustees, petitioned the appropriate court for instructions, and at the same time filed a petition requesting an order for partial distribution.

In the petition for instructions the following allegations appeared:

VI.

Among the claims filed and allowed is that of Desmond's, a corporation, which has been allowed in the sum of \$30,562.06, representing the balance of mutual account between Desmond's and the decedent, as follows:

Estate of Ralph R. Huesman, Deceased

Fiduciary Income Tax for
Fiscal Year Ended April 30, 1945

Income

Dividends:	
Desmond's	\$ 50,000.00
Farmers & Mer. Nat'l. Bank	450.00
Merchants Petroleum	15.00
Total	\$ 50,465.00
Interest:	
Farmers & Mer. Nat'l. Bank	12.50
Pacific Mutual L. Ins. Co.	3.85
Government Bonds	239.95
Less—Amount accrued to date of death, included in estate tax return	98.17
Other Income:	
Bonus from Desmond's	80,517.00
Total Income	\$ 131,140.13

*Deductions

Interest:	
Paid to Desmond's on note	\$ 3,231.20
Paid to Desmond's on note	470.05
	\$ 3,701.25

Taxes:

Personal Property Tax	96.48 (State)
R. E. Seal Beach	44.92 (State)
State Inc. Tax—1943	1,006.87
State Inc. Tax	1,006.87
State Inc. Tax—1944	95.63
	2,250.77
	\$ 5,952.02

*Election under Internal Revenue Code, Section 162(e). Items not claimed on Federal Estate Tax nor State Inheritance Tax.

Estate of Ralph R. Huesman, Deceased

Fiduciary Income Tax for
Fiscal Year Ended April 30, 1945

Deduction for amount of Federal Estate Tax and California Inheritance Tax—attributable to \$80,517.00 included in gross estate, to be taken on Fiduciary Income Tax Returns.

Net taxable Estate	\$3,303,107.18
Less Bonus	80,517.00
Net Estate would have been	\$3,222,590.18
Less Exemption	100,000.00
	\$3,122,590.18

Basic Tax

On \$3,000,000.00	\$ 238,500.00
\$122,590.18 @ 12%	14,710.82

Gross Basic	\$ 253,210.82
Less 80% (Calif.)	202,568.66

Net Basic Tax	\$ 50,642.16
---------------------	--------------

Tentative Tax

On \$3,000,000.00	\$1,263,200.00
162,590.18 @ 56%	91,050.50

Total Tax	\$1,354,250.50
Less Gross Basic Tax	253,210.82

Net Tentative Tax	1,101,039.68
	\$1,151,681.84

Internal Revenue Code, Sec. 126, F. E. Tax including bonus

Internal Revenue Code, Sec. 126, F. E. Tax excluding bonus

Difference=deduction attributable to \$80,517.00

State of California Inh. Tax including bonus

State of California Inh. Tax excluding bonus

Difference=deduction attributable to \$80,517.00 (State
Personal Inc. Tax Code, Section 17256)

\$1,189,041.73
1,151,681.84
\$ 37,359.89
\$ 210,298.29
202,568.66
\$ 7,729.63

Estate of Ralph R. Huesman, Deceased

Transcript of Entries
From Original Entry Books

Estate of Ralph R. Huesman, Deceased. Journal Entries—J 1.

5-3-44

Acct.
No.

Credit

Inventory of Assets

Cash in bank—See. 1st Natl.....	110		
—Chem. Bk. & Tr. Co. of N. Y.....	110		
Claims for disability benefits (Cont. Casualty Co.).....	120		
Real Estate, Seal Beach, Lots 32 & 36, Block 7, Bay City Tract.....	140		
U. S. Savings Bonds, Series E, Dated 1-1-42—\$400.00.....	130		
U. S. Savings Bonds, Series E, Dated 2-1-42—\$200.00.....	130		
U. S. Treasury Bonds, 1964-69, 2½%, Dated 9-15-43, due 12-15-69, 5M.....	130		
U. S. Treasury Bonds, 1965-70, 2½%, Dated 2-1-44, due 3-15-70, 3M.....	130		
Accrued interest receivable 1964-69.....	120		
Accrued interest receivable 1965-70.....	120		
Stock—Desmonds \$100 p.v. 9995 shs.....	130		
—Farmers and Merchants Nat'l Bank of L. A. \$100 p.v. 25 shs.....	130		
—Merchants Petroleum Co. Inc \$100 p.v. 500 shs.....	130		
—Wilshire Blvd. Center, Ltd. 6% cum. pfd. no par, 3350 shs.....	130		
Membership—Bel Air Country Club.....	190		
—California Club.....	190		
—J. A. Country Club.....	190		
Automobile, Cadillac 8 Touring Sedan, 1941 model 60-8, Eng. No. 6342221.....	150		
Jewelry.....	150		
Account receivable from Pacific Mutual Life Insurance Co. Original amount \$2,080.00; Unpaid balance \$1,934.40.....	120		
Estate principal.....	290		

To set up original assets of this Estate as shown by Inventory and Appraisalment filed 11/30/44 and Amendment dated 2/2/45.

Cash Receipts—R 1

4-30-45

Debit

Principal Cash

Received From

Desmond's—Decedent's Bonus Payment

Credit

No.

Cash Disbursements—C 2

4-30-45

Debit

Principal Cash

Credit

No.

Journal Entries—J 5

12-13-45

Distribution of Principal

Note payable—Wilshire Blvd. Center..... 210 | | || Principal cash..... | 210 | | |
Income cash.....	110		
Note receivable—Wilshire Blvd. Center.....	120		
Acct. receivable—Wilshire Blvd. Center.....	120		
U. S. Crt. Ind. Series E, 1946, 150M.....	130		
Tax Refund Bonds.....	130		
U. S. Series E Bonds, \$400.....	130		
U. S. Series E Bonds, \$200.....	130		
U. S. Treasury Bonds, 64-69 5M.....	130		
U. S. Treasury Bonds, 65-70, 3M.....	130		
U. S. Treasury Bonds 65-70, 100M.....	130		
U. S. Crt. Ind. Series D, 1946, 200M.....	130		
Stock—F. & M. Nat'l Bank, 54 shs.....	130		
—F. & M. Nat'l Bank, 50 shs.....	130		
—Merchants Petr. Co., 500 shs.....	130		
—Richfield Oil, 3 shs.....	130		
—Subway Terminal Corp., 50 shs.....	130		
—Wilshire Blvd. Center, Pfd., 5750 shs, 3250 shs.....	130		
—Wilshire Blvd. Center, Com., 7600 shs.....	130		
—Desmond's, Inc., 10,000 shs.....	130		
—Ambazac Way—Bel Air.....	140		
—Wilshire & Glendon.....	140		
—Bel Air lots.....	140		
—Westwood Blvd. lots.....	140		
—Bdwy. & Locust, Long Beach.....	140		
—Seal Beach lots.....	140		
—Manhattan Beach property.....	140		
—Jewelry.....	150		
Debit
CreditDebit
CreditDebit
Credit

\$ 30,220.07

\$2,169,493.63

71,000.00

155,417.56

30,220.07

2,031.06

97,773.88

14,400.00

150,000.00

35,732.81

306.00

153.00

5,000.00

3,003.75

100,000.00

200,000.00

14,040.00

11,500.00

150.00

25.12

No value

12,190.00

6,402.50

86,564.00

1,000,000.00

25,000.00

50,000.00

48,000.00

360,000.00

1,000.00

40,000.00

202.00

Estate of Ralph R. Huesman, Dec'd.—(Continued)

Journal Entries—J 6—(Continued)	Acct. No.	Debit	Credit
Membership—Bel Air Country Club.....	190		500.00
—California Club.....	190		No value
—L. A. Country Club.....	190		1,200.00
Interest in Gov't Property in Alaska.....	190		No value
Distribution of Principal.....	280		80,517.00

To record distribution of assets to testamentary trust per Court Order December 13, 1945.

Note: Account numbers are for following accounts on Estate books.

110.....	Principal cash
120.....	Accounts and notes receivable
130.....	Securities
140.....	Real Estate
150.....	Personal property
190.....	Other assets
210.....	Liabilities payable from principal
280.....	Distributions of principal
290.....	Ralph R. Huesman Estate Principal
310.....	Income cash

Journal Entries—J 1
12-13-45

	Acct. No.	Debit	Credit
Principal cash.....	110	\$ 32,251.13	
Notes receivable—Wilshire Blvd. Center.....	120	97,773.88	
Accounts receivable—Wilshire Blvd. Center.....	120	14,400.00	
U. S. Civ. Ind. Series E, 1946, 150M.....	130	150,000.00	
Tax refund bonds.....	130	34,216.51	
Tax refund bonds.....	130	1,516.30	
Series E savings bonds, \$400.....	130	306.00	
U. S. Treasury bonds, 1964-69, 5M.....	130	133.00	
U. S. Treasury bonds, 1965-70, 3M.....	130	5,000.00	
U. S. Treasury bonds, 1965-70, 100M.....	130	3,003.75	
U. S. Civ. Ind. Series D, 1946, 200M.....	130	100,000.00	
Stock—F. & M. Nat'l Bank, 54 shs.....	130	290,000.00	
—F. & M. Nat'l Bank, 50 shs.....	130	14,040.00	
—Merchants Petr. Co., 500 shs.....	130	11,500.00	
—Richfield Oil Corp., 3 shs.....	130	150.00	
—Subway Terminal Corp., 50 shs.....	130	25.12	
—Wilshire Blvd. Center, Common, 7600 shs.....	130	No value	
—Wilshire Blvd. Center, 50 shs.....	130	86,564.00	
—Fid., 5750 shs.....	130	12,190.00	
—Desmond's, Inc., 10,000 shs.....	130	6,402.50	
Real Estate.....	130	1,000,000.00	
Ambazac Way.....	140	25,000.00	
Wilshire & Glendon.....	140	50,000.00	
Bel Air lots.....	140	20,000.00	
Westwood Blvd. lots.....	140	48,000.00	
Bdwy. & Loenst, Long Beach.....	140	360,000.00	
Seal Beach lots.....	140	1,000.00	
Manhattan Beach property.....	140	40,000.00	
Jewelry.....	150	202.00	
Membership—Bel Air Country Club.....	190	500.00	
—California Club.....	190	No value	
—L. A. Country Club.....	190	1,200.00	
Interest in Alaska property.....	190	No value	
Advance to Loyola.....	280	80,517.00	
Prepaid insurance.....	390	1,500.80	
Note payable—Wilshire Blvd. Center.....	220		
Note payable—Mutual Life Ins., N. Y.....	220		
Trust Principal.....	290		

\$ 71,000.00
155,417.56
2,170,994.43

To record the receipts of assets from the Estate of Ralph R. Huesman, and the assumption of liabilities in connection therewith.

Journal Entries—J 3
12-13-45

Distribution of Principal

	Acct. No.	Debit	Credit
Trust Fund E.....	280	\$ 235,654.78	
Advance to Loyola.....	280		
Accounts payable.....			
Trust Fund E.....	210		

To record allocation of assets to Trust Fund as shown.

Huesman Trust Fund E

Journal Entries—J 1
12-13-45

	Acct. No.	Debit	Credit
Accounts receivable—Trust # 2035.....	120	\$ 155,137.78	
Advance distribution to Loyola.....	280		
Trust Principal.....	290	80,517.00	

\$ 235,654.78

To record allocation from Testamentary Trust, F. & M. Bank # 2035.

Note: Account numbers are for following accounts on trust books.

110.....	Principal cash
120.....	Accounts and notes receivable
130.....	Securities
140.....	Real estate
150.....	Personal property
190.....	Other assets
210.....	Accounts payable
220.....	Notes payable
280.....	Distribution of principal
290.....	Trust Principal
390.....	Prepaid expenses



EXHIBIT H

Estate of Ralph R. Huesman, Deceased

No. 223,009

In the Matter of

The Estate of RALPH R. HUESMAN,

Deceased.

PETITION FOR ORDER TO BORROW MONEY
ON UNSECURED NOTE

To the Above-Entitled Superior Court:

The petition of Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles respectfully shows that:

I.

They are the duly appointed, qualified and acting executors of the Last Will and Testament of Ralph R. Huesman, deceased; and they are the trustees named in said Last Will and Testament;

II.

The estate of Ralph R. Huesman, deceased, has been appraised by the California State Inheritance Tax Appraiser at a value of \$3,749,196.98, as shown by the inventory and appraisal on file herein.

III.

The first notice to creditors was published on June 21, 1944, and the time for filing claims has expired.

IV.

Claims and indebtedness against the estate and

ordinary executors and attorneys fees and commissions will amount to approximately \$150,000.

V.

Among the claims filed and allowed is that of Desmond's, a California corporation, which has been allowed in the sum of \$30,562.06, representing the balance of mutual accounts between Desmond's and the decedent, as follows:

Promissory note due Desmond's.....	\$ 80,283.30
Interest on note to date of death.....	3,231.20
Advances on open account.....	27,094.51
<hr/>	
Total due Desmond's at date of death.....	110,609.01
Plus Additional interest on note to date of claim	470.05
<hr/>	
Total due Desmond's at date of claim....	111,079.06
Less Compensation due decedent in form of bonus at date of death.....	80,517.00
<hr/>	
Net amount due Desmond's and allowed as a claim.....	\$ 30,562.06

VI.

By the terms of the will the net estate, being in excess of \$250,000.00, is to be distributed to Trustees, who are the same persons as your petitioning executors. Of the total net estate approximately 60% is to be held in trust for the lives of Nurma W. Huesman and Carol Ann Huesman Marcato; and the balance is to be distributed to certain named beneficiaries within a period of five years after distribution to Trustees. One of said beneficiaries is Loyola University of Los Angeles, Regents' Fund, which is entitled to a sum of money equal to approximately

5% of the Trusteed property, amounting to approximately \$98,000.

VII.

The executors propose to pay to Desmond's the full amount of decedent's aforesaid indebtedness plus interest, in the total sum of \$111,079.06; and to receive from Desmond's the sum of \$80,517.00 specifically as compensation due to the decedent in the form of a bonus at the time of his death. As a result of said mutual payments, Desmond's claim against the estate will thereby be fully paid.

VIII.

The executors further propose to pay the said sum of \$80,517.00 to themselves, as Trustees, for immediate distribution to Loyola University in partial satisfaction of its legacy, all as set forth in a petition for partial distribution filed herewith by your said petitioners as trustees.

IX.

The executors have consulted with Desmond's and said corporation has indicated its willingness that as soon as the executors pay to Desmond's the said sum of \$111,079.06, Desmond's will pay immediately to the executors said sum of \$80,517.00, representing the amount of compensation due in the form of a bonus at the date of decedent's death.

X.

The executors do not have sufficient cash on hand to carry out the plan set forth in the preceding paragraphs. The principal asset of the estate con-

sists of 9,995 shares of the capital stock of Desmond's, appraised at \$3,686,955.60 by the California State Inheritance Tax Appraiser. Said stock is unlisted and has no ready sale upon the market. The executors deem it inadvisable to sell any portion of the said stock at the present time. Upon said sale at a later date, however, the executors will have ample cash on hand to pay all claims, taxes and charges against the estate, including the present proposed loan of \$110,000.00.

XI.

For the purpose of procuring funds with which to carry out the aforesaid plan, the executors propose to borrow the sum of One Hundred Ten Thousand Dollars (\$110,000.00) from the Farmers and Merchants National Bank of Los Angeles for a period of three months, with interest at the rate of 2% per annum, and to make and execute an unsecured promissory note therefor. The Farmers and Merchants National Bank of Los Angeles has signified its willingness to make the loan upon the terms above specified and to extend said note in the event an extension should be requested.

XII.

Under the terms of the will, the trustees are given power to borrow money, with or without security, for any purpose, either from any of the Trustees individually or from others; to assume the payments of and to extend and renew any indebtedness incurred by testator or by his executors or trustees,

or secured by any property which may at any time form a part of the Trusteed Property.

XIII.

It will be to the advantage of said estate to raise the required money to carry out the above plan by borrowing said money for the reasons set forth in detail in the preceding paragraphs.

XIV.

Wherefore, petitioners pray that an order be made and entered herein authorizing them, as Executors of the Last Will and Testament of Ralph R. Huesman, deceased, to borrow the sum of One Hundred Ten Thousand Dollars (\$110,000.00) from the Farmers and Merchants National Bank of Los Angeles, payable in three months, with interest at the rate of 2% per annum, payable at maturity, and to make and execute a promissory note therefor in the usual form and containing the usual and customary obligations, and authorizing them to renew said note from time to time upon like terms and conditions.

Dated: April 6th, 1945.

/s/ NURMA W. HUESMAN,

FARMERS AND MERCHANTS NATIONAL
BANK OF LOS ANGELES,

By R. C. LEMMON,

Assistant Trust Officer.

/s/ NEIL S. McCARTHY,

Attorney for Petitioners.

State of California,
County of Los Angeles—ss.

Nurma W. Huesman, being sworn, says: That she is one of the petitioners in the above-entitled action; that she has read the foregoing petition and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information or belief and as to those matters that she believes it to be true.

NURMA W. HUESMAN.

Subscribed and sworn to before me on April 6,
1945.

MELBA S. DEEMING,
Notary Public in and for
Said County and State.

State of California,
County of Los Angeles—ss.

R. C. Lemmon, being sworn, says: That he is the Assistant Trust Officer of the Farmers and Merchants National Bank of Los Angeles, a national banking association, one of the petitioners in the above-entitled action, and that he is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

R. C. LEMMON.

Subscribed and sworn to before me on April 6th,
1945.

G. F. BIETSCH,
Notary Public in and for
Said County and State.

EXHIBIT J

Form 1041 1945
Treasury Department
Internal Revenue Service

United States
Fiduciary Income Tax Return
(For Estates and Trusts)

For Calendar Year 1945
or fiscal year beginning April 30, 1945, and ending March 31,
1946.

(File this return with Collector of Internal Revenue not later
than the 15th day of the third month following the close
of the taxable year.)

(Print Names and Address Plainly Below)

Name of Estate or Trust: CX-2035 Farmers & Mer. Nat'l Bank
of L. A.

Check ☒ Whether Estate ☐, or Trust ☒

Name and Address of Fiduciary: Nurma W. Huesman, Fred
B. Huesman and Farmers & Mer. Nat'l Bank of L. A., T/W
of Ralph R. Huesman, Deceased.

Item and Income
Instruction No.

5. Income from partnerships, and other fiduciaries
(from Schedule C).....\$ 80,517.00

10. Total income in items 1 to 9.....\$ 80,517.00

Deductions

14. Total deductions in items 11 to 13..... None

15. Balance (item 10 less item 14).....\$ 80,517.00

16. Less: Amount distributable to beneficiaries (total
of column 2, Schedule A, plus line (f), column
2a, Schedule B)..... 80,517.00

17. Net income (taxable to fiduciary) (item 15 less
item 16) None

Computation of Tax

18. Net income (item 17, above).....	None
20. Balance (surtax net income) (item 18 less item 19)	None
22. Balance subject to normal tax (item 20 less item 21)	None
25. Total Income Tax (item 23 plus item 24) (or line 14, Schedule E).....	None
28. Balance of Income Tax.....	None

Schedule A.—Beneficiaries' Shares of Income and Credits
(Include as beneficiaries persons to whom amounts were paid or set aside for religious, charitable, etc., purposes.) (See Instructions 4 and 16.)

1. Name and address of each beneficiary (Designate nonresident aliens, if any)	2. Taxable income exclusive of (a) interest on Government obligations subject to surtax only and (b) dividends to be reported in column 8.
Loyola University, Los Angeles, California.....	\$80,517.00
Totals	\$80,517.00

Continuation of Schedule A.—Blank

Schedule B.—Blank

Schedule C.—Income From Partnerships, and Other Fiduciaries
(See Instruction 5)

Name and address of fiduciary: Estate of Ralph R. Huesman, Deceased	\$ 80,517.00
Total (Enter as item 5, page 1).....	\$ 80,517.00

Schedule D.—Blank

Schedule E.—Blank

Schedule F.—Blank

Schedule G.—Blank

Schedule H.—Blank

Questions

1. Was an income tax return filed for the preceding year? No.
If so, to which collector's office was it sent?.....
2. Date estate or trust was created: April 30, 1945.
3. If copy of will or trust instrument and statement required under General Instruction I have been previously furnished, state when and where filed: Copy of Will filed with Fed. Est. Tax Return.

*Decree of distribution to trust dated 4/30/45.

*Copies of all instruments in files of Dempsey, Thayer, Deibert & Kumler, 1104 Pacific Mutual Building, Los Angeles, California.

4. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
5. Did the estate or trust at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No. If answer is "Yes," attach list showing name and address of each such corporation and amount of stockholdings.
6. If return is for a trust, state name and address of grantor: T/W Ralph R. Huesman, Deceased.

Affidavit—Blank

Filed at hearing March 20, 1950.

[Title of Tax Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel as follows:

1. A stipulation of facts was heretofore entered into between the parties and filed in this action in which reference was made on line 15 of page 3 thereof to a copy of an Order authorizing executors to borrow money on unsecured note attached as Exhibit I to said stipulation.

2. That the document referred to in said stipulation as Exhibit I was inadvertently omitted, and a copy of the document referred to as Exhibit H in said stipulation was erroneously attached to said stipulation as Exhibit I.

3. There is attached hereto the document referred to in said stipulation as Exhibit I and is submitted

in lieu of the document attached to said stipulation and marked Exhibit I.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

/s/ H. B. THOMPSON,
Of Counsel.

/s/ CHARLES OLIPHANT, ECC.
Chief Counsel, Bureau of
Internal Revenue.

EXHIBIT I

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 233,009

In the Matter of
The Estate of RALPH R. HUESMAN,
Deceased.

ORDER AUTHORIZING EXECUTORS TO
BORROW MONEY ON UNSECURED NOTE

The petition of Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, Executors of the Estate of Ralph R. Huesman, Deceased, for an order to borrow money on unsecured note came on regularly to be heard this 30th day of April, 1945. Proof having been made to satisfaction of the Court, the Court finds that due notice of the hearing of said petition has been regularly given for the period

and in the manner required by Sections 1200 and 1201 of the Probate Code; and no person appearing to contest said petition, the Court, after a full hearing, is satisfied that it is for the advantage of said Estate to make an unsecured promissory note to the Farmers and Merchants National Bank of Los Angeles for the sum of One Hundred Ten Thousand Dollars (\$110,000.00).

It Is Hereby Ordered That Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as the Executors of the Estate of Ralph R. Huesman, Deceased, be and they are hereby authorized, empowered and directed to borrow from the Farmers and Merchants National Bank of Los Angeles, the sum of One Hundred Ten Thousand Dollars (\$110,000.00), and to execute their promissory note, as such Executors, therefor, without security, said note to be payable in three (3) months from date, with interest at the rate of two per cent (2%) per annum, payable at maturity, and with a provision that said note may be renewed from time to time upon like terms and conditions.

Done in open Court this 30th day of April, 1945.

NEWCOMB CONDEE,

.....,

Judge of the Superior Court.

Received and filed T.C.U.S. January 17, 1951.

The Tax Court of the United States

Docket No. 20164

ESTATE OF RALPH R. HUESMAN, Deceased,
NURMA W. HUESMAN, FRED B. HUES-
MAN, and THE FARMERS AND MER-
CHANTS NATIONAL BANK OF LOS AN-
GELES, Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated March 29, 1951.

Petitioners, during the taxable year, received cash constituting the payment of a bonus owing decedent at the time of his death. Under court order they immediately paid this cash over to trustees who in turn paid it to a beneficiary under the trust as a partial satisfaction of its legacy. The money was included in decedent's estate income tax return under section 126 of the Internal Revenue Code, and then deducted under section 162 of the code. Held, section 126 is a remedial provision enacted for the benefit of a decedent in connection with his final income tax return, and relates to income earned by a decedent but not as yet received at the time of his death; while section 162 refers to income earned by an estate during its administration, and does not apply to items which are income

merely because of section 126. Therefore, the deduction, under section 162, was incorrect.

H. B. THOMPSON, ESQ.,

For the Petitioners.

ROBERT H. KINDERMAN,
ESQ.,

For the Petitioners.

OPINION

Rice, Judge:

The Commissioner determined a deficiency in income tax for the fiscal year ended April 30, 1945, in the amount of \$57,923.50. The sole issue is whether in determining taxable net income of the estate, petitioners were correct in deducting an amount of \$80,517 under section 162 of the Internal Revenue Code.

All of the facts were stipulated, are so found and are incorporated herein.

The return was filed with the collector of internal revenue for the sixth district of California.

Ralph R. Huesman, a resident of California, died testate on May 3, 1944, leaving an estate of about four million dollars. Decedent's will was admitted to probate by order of the Superior Court of Los Angeles, on June 14, 1944. The decedent provided for alternative distributions of his property based upon the size of his estate. Under the terms of the will which became operative, all of decedent's property was placed in trust. Since the estate exceeded

\$250,000, the provisions of the will involved in the instant case are as follows:

Article V.

I give, devise and bequeath all the rest, residue, and remainder of my estate, real, personal and mixed, of every kind and nature and wherever situated, which I may own at the time of my death, and all other property over which I may have any power of disposition (all of said property being hereinafter referred to as the "Trusteed Property"), to the Trustees hereinafter named, to have and to hold upon the following trusts and conditions:

E * * *

5. The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusteed Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); * * * and the balance of said sum of money shall be paid and distributed by the Trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths (5/10th); * * *. Such conversion of Trusteed Property into money and pay-

ments and distributions made to said organizations shall be made by the Trustees within five (5) years after distribution to the Trustees and shall be made at such time and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trust Estate, and the Trustees may exercise in their sole discretion as to when and in what amounts such payments and distributions shall be made within said period of five (5) years. * * *

At the time of his death, decedent was president of Desmond's, a retail merchandising corporation carrying on business in southern California. There was due and owing decedent from Desmond's at the time of his death, the sum of \$80,517 as a bonus for services rendered by him prior to his death. This amount was included in the Federal estate tax return as part of the gross estate under section 811 of the Internal Revenue Code, as the value of decedent's claim against Desmond's.

On April 10, 1945, the executors of the petitioner estate, in that capacity and their capacity as testamentary trustees, petitioned the appropriate court for instructions, and at the same time filed a petition requesting an order for partial distribution.

In the petition for instructions the following allegations appeared:

VI.

Among the claims filed and allowed is that of Desmond's, a corporation, which has been allowed in the sum of \$30,562.06, representing the balance of mutual account between Desmond's and the decedent, as follows:

Promissory note due Desmond's.....	\$ 80,283.30
Interest on note to date of death.....	3,231.20
Advances on open account.....	27,094.51

Total due Desmond's at date of death	110,609.01
Plus additional interest on note to date of claim	470.05

Total due Desmond's at date of claim	111,079.06
Less Compensation due decedent in form of bonus at date of death.....	80,517.00

Net amount due Desmond's and allowed as a claim.....	30,562.06
---	-----------

* * *

VIII.

* * * One of said beneficiaries is Loyola University of Los Angeles, Regents' Fund, which is entitled to a sum of money equal to approximately 5% of the Truſteed Property, amounting to approximately \$98,000.00.

IX.

Loyola University is an educational institution located in Los Angeles, California. Said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent's will in the amount of said bonus, to wit, the sum of \$80,517.00.

On April 10, 1945, concurrent with the other peti-

tions, the executors requested an order to borrow \$110,000 for three months on an unsecured note.

On April 30, 1945, the court entered its order, ordering the executors to borrow the \$110,000, to pay the same to Desmond's, and to receive from Desmond's the \$80,517. Throughout the orders, the court referred to the \$80,517 specifically as compensation due decedent in the form of a bonus at the time of his death. The executors were ordered to pay this specific sum to the testamentary trustees who in turn were ordered to pay the same specific sum to Loyola University, Regents' Fund, as the ultimate beneficiary under the trust, in partial satisfaction of its legacy, which was approximately \$98,000.

On the same day, April 30, 1945, Desmond's paid the \$80,517 to the executors, who paid it to the testamentary trustees, who in turn paid it to Loyola University, Regents' Fund. At the time the testamentary trustees received and distributed the \$80,517 it constituted the only cash asset of the trust estate. The petitioner estate also borrowed \$110,000 on a three-month unsecured note from The Farmers and Merchants National Bank of Los Angeles (an executor and trustee of the estate) on April 30, 1945. This sum was repaid on July 30, 1945. The \$110,000 so borrowed was applied to pay Desmond's claim against the estate of \$111,079.06.

In all accounting records of the estate, and the trust, the \$80,517 was treated as principal, i. e., as a receipt of, and distribution of, principal.

Under both section 811 (a) of the Internal Reve-

nue Code and section 600 of the California Probate Code, the bonus is considered part of the corpus of the decedent's estate. *Estate of G. Percy McGlue*, 41 B.T.A. 1199 (1940).

In its Federal income tax return for the year ended April 30, 1945, the petitioner estate reported the \$80,517 item as income of the estate under section 126 (a) (1) (A) of the Internal Revenue Code. It deducted \$37,359.89¹ on its 1945 return as the amount of estate tax attributable to the inclusion of the \$80,517 item in the Federal estate tax return, as authorized by section 126 (c) of the Internal Revenue Code and deducted \$80,517 as an allowable deduction under section 162 of the Internal Revenue Code, or deductions totaling \$117,876.89. The applicable provisions are set forth in the margin.²

¹The change of this amount to \$36,514.30 by the respondent is not contested by the petitioner.

²Sec. 126. Income in Respect of Decedents.

(a) Inclusion in Gross Income.—

(1) General Rule.—The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received, of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;

* * *

(3) Character of Income Determined by Reference to Decedent.—The right, described in paragraph (1), to receive an amount shall be treated, in the hands of the estate of the decedent or any person

The basic question here is whether, as a matter of law, the petitioners are entitled to a deduction under one of the subsections of section 162 of the Code. In determining petitioners' right to a deduction we must look to the provisions of the decedent's will and ascertain his intention with respect to the disposition of his property. Article V of the will provides for the transfer of decedent's residuary estate to trustees under certain trusts and conditions. One of these trusts provided that the trustees should pay and distribute a sum of money equal to five per cent of the Trusteed Property to Loyola University.

who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction by which the decedent acquired such right; and the amount includible in gross income under paragraph (1) or (2) shall be considered in the hands of the estate or such person to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.

* * *

(c) Deduction for Estate Tax.—

(1) Allowance of Deduction.—A person who includes an amount in gross income under subsection (a) shall be allowed, for the same taxable year, as a deduction an amount which bears the same ratio to the estate tax attributable to the net value for estate tax purposes of all the items described in subsection (a) (1) as the value for estate tax purposes of the items of gross income or portions thereof in respect of which such person included the amount in gross income (or the amount included in gross income, whichever is lower) bears to the value for estate tax

The trustees were authorized to turn the Trusteed Property into money and make the payments to Loyola University and other named organizations at any time within five years after distribution of the Trusteed Property to the trustees. Article V of decedent's will makes no provision whatsoever for the distribution of any sum of money as income to Loyola University but only for the payment and distribution of a sum of money equal to five per cent of the Trusteed Property (the exact language is 5/10ths of 10% of the Trusteed Property). Our analysis of this portion of the decedent's will con-

purposes of all the items described in subsection (a) (1).

(2) Method of Computing Deduction.—For the purposes of paragraph (1):

(A) The term "estate tax" means the tax imposed upon the estate of the decedent under section 810 or 860, reduced by the credits against such tax, plus the tax imposed upon the estate of the decedent under section 935, reduced by the credits against such tax.

(B) The net value for estate tax purposes of all the items described in subsection (a) (1) shall be the excess of the value for estate tax purposes of all the items described in subsection (a) (1) over the deductions from the gross estate in respect of claims which represent the deductions and credit described in subsection (b).

(C) The estate tax attributable to such net value shall be an amount equal to the excess of the estate tax over the estate tax computed without including in the gross estate such net value.

Sec. 162. Net Income. The net income of the estate * * * shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction

vinces us that decedent intended by the hereinabove-quoted portions of Article V to distribute a part of the trust corpus and that he made no provision whatsoever for the distribution of any sum as income.

Petitioners herein have recognized that the bonus item, under section 126, is taxable income to the decedent's estate and the stipulated facts show that they have so reported it. It should also be noted that petitioners have claimed and been allowed a deduction under section 126 (c) because of the estate tax attributable to the inclusion in decedent's gross

(in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) There shall be allowed as an additional deduction in computing the net income of the estate * * * the amount of the income of the estate * * * for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income

estate of the value of the claim against Desmond's of \$80,517.

Up to this point the parties are in agreement about the application of the Code in determining the income tax liability of the decedent's estate. The controversy arises because the petitioners contend that they are also entitled to deduct the \$80,517 paid over to the trustees upon the order of the court, which order refers to the \$80,517 as compensation due decedent in the form of a bonus at the time of his death. It is petitioners' contention that, since they collected the \$80,517 as an income item, it still retained its income character when distributed by the executors.

We have found no case directly in point. A look at the legislative history of section 126 is helpful in determining what effect its addition to the Code

for the taxable year of the estate * * * which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estates, * * * there shall be allowed as an additional deduction in computing the net income of the estate * * * the amount of the income of the estate * * * for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary;

had on section 162. Section 42 of the Revenue Act of 1934 required all income accrued up to the date of death, not otherwise properly includible for such period or a prior period, be included in the income tax return of a decedent for the period in which fell the date of his death. This provision was enacted because the courts had held under prior law that income accrued before death but received by the estate was not income to the estate but a part of corpus. Cf. *Nichols v. United States*, 64 Ct. Cls. 241 (1927), certiorari denied, 277 U. S. 584 (1928); *Commissioner v. United States Trust Company of New York*, 143 Fed. (2d) 243 (CA-2, 1944), certiorari denied, 323 U. S. 727 (1944). Therefore, since neither the estate nor the decedent ever paid income tax on such amounts, until this provision of the Revenue Act of 1934 changed the treatment, such amounts escaped income tax entirely. H. Rept. No. 704, 73rd Cong., 2nd Sess., §§ 42 and 43 (1934) p. 24; Sen. Rept. No. 558, 73rd Cong., 2nd Sess., §§ 42 and 43 (1934) p. 28.

This provision of the Revenue Act of 1934 required the inclusion of the value for services rendered, whether based on agreed compensation or on quantum meruit, in decedent's final return as accrued income. *Helvering v. Estate of Enright*, 312 U. S. 636 (1941); *Pfaff, et al., Executors v. Commissioner*, 312 U. S. 646 (1941). In some instances, such treatment resulted in hardship as, quite frequently, amounts which would have been received over a number of years were returnable in the year

of death thus boosting the income into much higher brackets.

To alleviate such hardship, section 126 of the Code was added by the Revenue Act of 1942 to provide that income accruing to a decedent because of his death was not includible in his final return but was to be treated as income and reported as income by the one receiving the right to such income (usually the estate). Such treatment was for the express purpose of alleviating a hardship and at the same time preventing certain income from escaping income taxation. H. Rept. No. 2333, 77th Cong., 2nd Sess., § 125 (1942) p. 83; Sen. Rept. No. 1631, 77th Cong., 2nd Sess., § 135 (1942) p. 100.

The Claim which decedent's estate had against Desmond's was at all times part of the corpus of decedent's estate. The fact that the Congress saw fit to relieve the hardship to a decedent, from an income tax standpoint, by requiring that the amount collected on such claim be reported as income of the decedent's estate, in no wise affects the character of this asset which was fixed and determined at the date of the decedent's death. The subsequent liquidation of the claim merely converted the form of the asset from a chose in action into cash. When the executors transferred the amount of the liquidated claim to the trustees pursuant to the order of the court, they transferred a part of the decedent's residuary estate to the trustees who were then directed to proceed further with respect to the distribution of the testamentary trust in accordance with the intention of the decedent's will. It was the trus-

tees who made the distribution to the trust beneficiary, Loyola University. The beneficiary received the corpus of the trust and not income of the trust. The trust at that time had no income for our findings show that the \$80,517 was the only cash asset in the hands of the trustee.

Our ultimate conclusion is further strengthened by those cases which held that where capital gains are distributed by an estate, such distributions are not deductible as payment of income under section 162 where either the will or the law of the state having jurisdiction provides that such gains constitute corpus. Cf. *Charles Simon, et al., Executors v. Hoey*, 88 Fed. Supp. 754 (1949), *affd.*, per curiam, 180 Fed. (2d) 354, (CA-2, 1950), certiorari denied, 339 U. S. 266 (1950); *Estate of Henry H. Rogers*, 1 T. C. 629, 637, 638 (1943), *affd.*, 143 Fed. (2d) 695, (CA-2, 1944), certiorari denied, 323 U. S. 780 (1944); *Weigel v. Commissioner*, 34 B.T.A. 237, 239 (1936), *affd.*, 96 Fed. (2d) 387 (CA-7, 1938); *Anna M. Chambers, et al., Trustees*, 33 B.T.A. 1125 (1936).

In view of the foregoing we hold that the Commissioner correctly denied any deduction under section 162, Internal Revenue Code.

Reviewed by the Court.

Decision will be entered for the respondent.

Served March 29, 1951.

The Tax Court of the United States
Washington

Docket No. 20164

ESTATE OF RALPH R. HUESMAN, Deceased,
NURMA W. HUESMAN, FRED B. HUES-
MAN, and THE FARMERS AND MER-
CHANTS NATIONAL BANK OF LOS
ANGELES, Executors,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated March 29, 1951, it is

Ordered and Decided: That there is a deficiency in income tax of \$57,923.50 for the fiscal year ended April 30, 1945.

Entered March 30, 1951.

[Seal] /s/ STEPHEN E. RICE,
Judge.

Served April 2, 1951.

In the United States Court of Appeals
for the Ninth Circuit

No. 20164

ESTATE OF RALPH R. HUESMAN, Deceased,
NURMA W. HUESMAN, FRED B. HUES-
MAN, and THE FARMERS & MERCHANTS
NATIONAL BANK OF LOS ANGELES,
Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION TO REVIEW DECISION OF THE
UNITED STATES TAX COURT

Now come Nurma W. Huesman, Fred B. Huesman and The Farmers & Merchants National Bank of Los Angeles, Executors of the Estate of Ralph R. Huesman, deceased, by H. B. Thompson of Dempsey, Thayer, Deibert & Kumler, their attorneys, and petition the United States Court of Appeals for the Ninth Circuit for a review of the decision of the United States Tax Court rendered and entered on March 30, 1951, in cause numbered 20164 of said court, wherein they were petitioners, and the Commissioner of Internal Revenue was respondent, and in support of their petition respectfully show this Honorable Court as follows:

Venue

The petitioners Nurma W. Huesman and Fred B. Huesman are now and at all times herein material were individuals residing within the judicial circuit of this court. The Farmers and Merchants National Bank of Los Angeles is now and at all times herein material has been doing business with principal place of business located within the judicial circuit of this court. The income tax return of the Estate of Ralph R. Huesman, deceased, for the fiscal year ended April 30, 1945, being the year here in issue, was filed by the executors of said estate in the office of the Collector of Internal Revenue for the 6th Collection District of California in Los Angeles and within the judicial circuit of this court.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

Nature of the Controversy

On May 4, 1944, Ralph R. Huesman died testate. By the terms of his will he transferred his residuary estate to trustees to pay certain bequests, among them a bequest to the Regents' Fund of Loyola University. At the time of his death there was owing but as yet unpaid to him as salary or bonus for services rendered to Desmonds, a corporation of which he was president, the sum of \$80,517.00. This sum was paid by Desmonds to the executors of Mr. Huesman's estate on April 30, 1945, and by them in turn, distributed pursuant to the probate court's

order to trustees of the testamentary trust established by testator's will. On the fiduciary income tax return filed by the executors for the fiscal year ended April 30, 1945, said sum of \$80,517.00 was reported as gross income pursuant to section 126 of the Internal Revenue Code and a deduction therefor was taken by the executors in the same amount pursuant to section 162 of the Internal Revenue Code by reason of the distribution they made to the testamentary trust.

The Commissioner of Internal Revenue denied the deduction taken by the executors on account of said distribution and by reason thereof assessed a deficiency of \$57,923.50 to the executors. The United States Tax Court in its decision promulgated March 29, 1951, and entered March 30, 1951, sustained the Commissioner's action. The issue presented on this review therefore is to determine whether the petitioners were entitled to said deduction under section 162 of the Internal Revenue Code on account of the distribution of said sum of \$80,517.00 pursuant to court order to the testamentary trustees under the will of Ralph R. Huesman, deceased.

Court in Which Review Is Sought

Review of the United States Tax Court's decision is sought in the United States Court of Appeals for the Ninth Circuit.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorney for Petitioners.

State of California,
County of Los Angeles—ss.

H. B. Thompson, being first duly sworn, deposes and says that he is counsel of record in the above-entitled cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein, and that the statements made are true to the best of his knowledge, information and belief.

/s/ H. B. THOMPSON.

Subscribed and sworn to before me this 24th day of May, 1951.

[Seal] /s/ DOROTHY ERBEN,
Notary Public in and for
Said County and State.

Service of Copy acknowledged.

Filed T.C.U.S. June 4, 1951.

[Title of Tax Court and Cause.]

NOTICE OF FILING OF PETITION FOR
REVIEW OF DECISION OF THE UNITED
STATES TAX COURT

To: General Counsel of The Bureau of Internal
Revenue, Washington, D. C.

Notice is hereby given that Nurma W. Huesman,
Fred B. Huesman, and The Farmers & Merchants

National Bank of Los Angeles, Executors of the Estate of Ralph R. Huesman, petitioners in the above-entitled cause, hereby petition the Court of Appeals for the Ninth Circuit for review of the decision of The Tax Court of the United States in the above-entitled cause entered March 30, 1951. Copy of the Petition to Review Decision of said Court in the above-entitled cause is served herewith.

Dated: June 7th, 1951.

/s/ H. B. THOMPSON,
Attorney for Petitioners.

Service of Copy acknowledged.

Received and filed T.C.U.S. June 18, 1951.

[Title of Tax Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be certified and filed in the United States Court of Appeals for the Ninth Circuit pursuant to a petition for review filed and noticed in the above-entitled cause, and to include in such transcript of record the following:

- (1) Petition, filed September 2, 1948.
- (2) Answer to petition, filed September 28, 1948.
- (3) Motion to amend petition, filed June 7, 1950, and order of same date, granting motion.

(4) Amended petition, filed June 7, 1950.

(5) Written stipulation introduced at hearing held March 30, 1950, as joint exhibit and exhibits thereto attached except Exhibit I.

(6) Written stipulation and Exhibit I thereto attached mailed to the clerk of the above court by the undersigned from Los Angeles, January 15, 1951.

(7) Opinion and decision of the above-entitled court promulgated March 29, 1951, and entered March 30, 1951.

Since the foregoing constitutes the entire record no statement of Points Relied Upon is incorporated herein.

Dated: June 7, 1951.

/s/ H. B. THOMPSON,
Attorney for Petitioners.

Service of Copy acknowledged.

Received and filed T.C.U.S. July 5, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Record on Review" in the proceeding before The Tax Court of the United States entitled "Estate of

Ralph R. Huesman, Deceased, Nurma W. Huesman, Fred B. Huesman, and The Farmers & Merchants National Bank of Los Angeles, Executors, Petitioners, v. Commissioner of Internal Revenue, Respondent," Docket No. 20164 and in which the petitioners in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of July, 1951.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court
of the United States.

[Endorsed]: No. 13006. United States Court of Appeals for the Ninth Circuit. Estate of Ralph R. Huesman, Deceased, Nurma W. Huesman, Fred B. Huesman and The Farmers & Merchants National Bank of Los Angeles, Executors, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed July 9, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13006

Estate of RALPH R. HUESMAN, Deceased,
NURMA W. HUESMAN, FRED B. HUES-
MAN, and THE FARMERS & MERCHANTS
NATIONAL BANK OF LOS ANGELES,
Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

POINTS RELIED ON AND DESIGNATION
OF RECORD

To: The Clerk of the Above-Entitled Court:

A. Points Relied Upon:

The following constitute the points upon which appellants rely for reversal of the United States Tax Court's decision entered in the above-entitled matter:

I.

The Court erred in holding as a matter of law that appellants were not entitled in the computation of taxable net income for the taxable year 1945, to deduct from gross income under Section 162 of the Internal Revenue Code, the sum of \$80,517.00 distributed by them to the Testamentary Trustees during the fiscal year ended April 30, 1945.

II.

The Court erred as a matter of law in concluding that the sum of \$80,517.00 owed Ralph R. Huesman at the time of his death as bonus and paid by Desmond's to the executors of his estate was within the meaning of Section 126 of the Internal Revenue Code an item of gross income but was not an item of gross income within the meaning of Section 162 (a).

III.

The Court erred as a matter of law in concluding that the Will of Ralph R. Huesman, deceased, did not authorize the executors of his estate to distribute the sum of \$80,517.00 as income, said sum constituting a bonus due him at the time of his death for services rendered to Desmond's paid to the executors of his estate and distributed by them during the fiscal year ended April 30, 1945.

IV.

The Court erred in holding that for the fiscal year ended April 30, 1945, the Estate of Ralph R. Huesman, deceased, was liable for Federal income tax in the amount of \$57,923.50 on account of the inclusion within its taxable net income of the sum of \$80,517.00 bonus received and distributed by the executors during said year, whereas if any entity was taxable on account of said item, it was the Testamentary Trust under the Will of the said Ralph R. Huesman.

V.

The Court erred in failing to find that during the fiscal year ended April 30, 1945, the executors

of the Estate of Ralph R. Huesman, deceased, paid or permanently set aside the sum of \$80,517.00 of gross income of the estate pursuant to the terms of decedent's Will to be used exclusively for religious, charitable, scientific, literary and educational purposes.

VI.

The Court erred in deciding that for the fiscal year ended April 30, 1945, the Estate of Ralph R. Huesman, deceased, was liable for a deficiency of Federal income tax amounting to \$57,923.50, or any other sum.

VII.

The Court erred in failing to find that appellants made an overpayment of Federal Income Tax for the taxable year 1950 in the amount of \$71,459.35.

B. Designation of Record:

The following portions of the record are deemed by the appellants material to the consideration of the appeal in the above-entitled cause:

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Answer	3
Motion to Amend Petition Filed June 7, 1950—Granted.....	4
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Points Relied On and Designation of Record

Dated:, 1951.

/s/ T. R. DEMPSEY,

/s/ BEN THOMPSON,

Attorneys for Petitioners.

Service of Copy acknowledged.

[Endorsed]: Filed July 25, 1951.

No. 13006.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF RALPH R. HUESMAN, Deceased, NURMA W.
HUESMAN, FRED B. HUESMAN and THE FARMERS &
MERCHANTS NATIONAL BANK OF LOS ANGELES, Execu-
tors,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' OPENING BRIEF.

THOMAS R. DEMPSEY,
WELLMAN P. THAYER,
ARTHUR H. DEIBERT,
WILLIAM L. KUMLER,
H. B. THOMPSON,

523 West Sixth Street,
Los Angeles 14, California,

Attorneys for Appellants.

OCT 18 1951



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I.

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No. 13006.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF RALPH R. HUESMAN, Deceased, NURMA W.
HUESMAN, FRED B. HUESMAN and THE FARMERS &
MERCHANTS NATIONAL BANK OF LOS ANGELES, Execu-
tors,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

By registered letter mailed pursuant to Section 272 of the Internal Revenue Code (26 U. S. C. 272) on August 3, 1948, the Commissioner of Internal Revenue notified appellants of his determination of a deficiency of Federal Income Taxes for the fiscal year ended April 30, 1945, of \$57,923.50. [R. 31.] Thereafter on September 2, 1948, appellants filed with The Tax Court of the United States their petition appealing from the Commissioner's determination and said Court properly assumed jurisdiction over said appeal pursuant to Section 1101 of the Internal Revenue Code (26 U. S. C. 1101.) [R. 5.] On June 7, 1950, upon motion duly made and granted appellants filed their amended petition with said Court al-

leging in addition to those things alleged in the original petition, only that appellants had prior to the filing of said amended petition paid to the Collector of Internal Revenue for the Sixth Collection District of California the deficiency determined by the Commissioner as aforesaid. [R. 12.] On or about September 23, 1948, the Commissioner filed his answer to appellants' original petition. [R. 11.] He filed no answer to appellants' amended petition. Thereafter on March 20, 1950, a hearing was had before The Tax Court which entered its decision on March 30, 1951, in favor of the Commissioner. [R. 140.]

On June 4, 1951, and within the time required by Section 1142 of the Internal Revenue Code (26 U. S. C. 1142), appellants filed with the clerk of The Tax Court their petition for review and served a copy and notice thereof on the Commissioner pursuant to Rule 30 of this Court. [R. 141.] Jurisdiction of this Court to review the decision of The Tax Court in this case therefore exists by virtue of Section 1141 of the Internal Revenue Code (26 U. S. C. 1141).

Statement of the Case.

On May 3, 1944, Ralph R. Huesman died testate, a resident of the State of California. At the time of his death he was President of Desmond's, a California corporation, which was conducting a retail merchandising business in Southern California. There was due and owing to him from said corporation at the time of his death the sum of \$80,517.00 as compensation for services rendered as President of Desmond's up to the date of his death. [R. 32.]

By order of the Superior Court of Los Angeles County entered June 14, 1944, decedent's Last Will and Testa-

ment was admitted to probate. The net value of the estate exceeded \$250,000.00, a fact important in determining the applicable provisions of the Will. [R. 54.] After making certain recitations and bequests, the will provided in applicable part as follows:

“I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of every kind and nature and wherever situated, which I may own at the time of my death, and all other property over which I may have any power of disposition (all of said property being hereinafter referred to as the ‘Trusted Property’), to the Trustees hereinafter named, to have and to hold upon the following trusts and conditions [R. 41]:

* * * * *

“If my wife shall elect to take under the terms of this Will, and in the event that the net value of my estate is Two Hundred and Fifty Thousand Dollars (\$250,000.00) or more, then the provisions with reference to the Trusted Property shall be as follows:

* * * * *

“The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusted Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); which said respective sums shall be distributed as soon as reasonably possible, and the balance of said

sum of money shall be paid and distributed by the Trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths (5/10ths);
* * *."

At all times herein material Loyola University was included in the cumulative list of organizations, contributions to which were ruled by the Commissioner of Internal Revenue deductible under Sections 23(o) and 23(q) of the Internal Revenue Code. The Regents' Fund is the building fund of said University and is used solely for the University in its building expansion program. Said fund is administered by the President of the University and checks drawn thereon are signed by him or by the Treasurer. [R. 33.]

On or about April 10, 1945, the executors of the Estate of Ralph R. Huesman, Deceased, in that capacity and in their capacity as testamentary trustees, petitioned the Superior Court for the State of California in and for the County of Los Angeles, as the Court exercising probate jurisdiction of said Estate, for instructions. [R. 82.] Concurrently therewith said executors filed a Petition for an Order of Partial Distribution. [R. 91.]

On April 30, 1945, after a hearing on said petitions, said Court entered its order and decree of partial distribution. [R. 103.] Among other things it found "that among the assets of said estate and constituting a part of the corpus thereof, is an item of compensation due the decedent in the form of a bonus from Desmond's, a corpora-

tion, in the sum of \$80,517.00, and the Court went on to direct as follows:

“It is therefore ordered and decreed that Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Executors of the Estate of Ralph R. Huesman, deceased, upon receiving said certain sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from Desmond’s, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; and said Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as said Trustees under the Will of Ralph R. Huesman, Deceased, shall distribute said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Loyola University of Los Angeles, Regents’ Fund, in partial satisfaction of its bequest under the Will of said Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution order herein made.”

Concurrently therewith the Superior Court entered its Order Instructing Testamentary Trustees to Make Partial Distribution. The portion thereof material to the issue here involved is as follows:

“That under an order and decree of partial distribution granted by this Court on this day, the Executors, upon receiving said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) from

Desmond's, a corporation, specifically as compensation due the decedent in the form of a bonus at the time of his death, shall deliver said specific sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased; that said sum constitutes the sole estate of said testamentary trust; that there are no liabilities to any creditors under said trust; that the said legacy or share of the trust estate set forth above may be distributed to Loyola University, Regents' Fund, as the institution entitled thereto, without loss to the creditors or injury to the trust estate, or any person interested therein; and that it is unnecessary that the legatee give bond;

It is therefore ordered and decreed that the said sum of Eighty Thousand Five Hundred Seventeen Dollars (\$80,517.00) received by Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Executors of the Estate of Ralph R. Huesman, Deceased, from Desmond's, a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, and delivered under order of this Court, as a specific sum to Nurma W. Huesman, Fred B. Huesman and Farmers and Merchants National Bank of Los Angeles, as Trustees under the Will of Ralph R. Huesman, Deceased, shall be delivered as a specific sum to Loyola University of Los Angeles, Regents' Fund, in partial satisfaction of its bequest under the Will of Ralph R. Huesman, Deceased; and that no bond shall be required by reason of any distribution granted hereunder.

Done in open Court this 30th day of April, 1945."

Thereafter, on April 30, 1945, Desmond's paid to the executors of the Estate of Ralph R. Huesman, deceased, the sum of \$80,517.00 as compensation or bonus for services rendered by decedent to said corporation up to the date of his death, and on the same day the executors paid to the Testamentary Trustees of the trust aforesaid, said sum of \$80,517.00 pursuant to the above Order of Partial Distribution. Later the same day, the Trustees paid to Loyola University of Los Angeles, Regents' Fund, the sum of \$80,517.00 pursuant to the Court's order instructing them. At the time of the receipt of said sum of \$80,517.00 by the Testamentary Trustees and at the time of distribution thereof by them as aforesaid, said sum constituted the only cash asset of the trust estate. The only other then existing asset of the trust estate was its right to receive the trust corpus from the decedent's estate. [R. 36.]

Thereafter and within the time provided by law the appellants filed with the Collector of Internal Revenue for the Sixth District of California a fiduciary income tax return on Treasury Department Form 1041 for the Estate of Ralph R. Huesman, Deceased. Said return included within gross income the item "bonus from Desmond's \$80,517.00" and among others took a deduction of \$80,517.00 as "amount distributable to beneficiaries." [R. 107.] At all times herein material appellants kept their books and filed their Federal Income tax returns on a cash receipts and disbursements basis. [R. 36.]

Within the time allowed by law for filing thereof the testamentary trustees under the Will of the said Ralph R. Huesman, Deceased, filed with the Collector of Internal Revenue for the Sixth Collection District of California a fiduciary income tax return on Treasury Department Form 1041 for the fiscal year ended April 30, 1945. Said return showed a gross income of \$80,517.00 and deductions for distributions for "amounts distributable to beneficiaries" of \$80,517.00. [Stip., Ex. J, R. 121.]

On August 3, 1948, the Commissioner of Internal Revenue notified appellants of his determination that for the fiscal year ended April, 1945, there was a deficiency of Federal income tax amounting to \$57,923.50. The letter stated that the basis for the deficiency was that \$80,517.00 claimed as a deduction for amounts distributable to beneficiaries was disallowed as not constituting a proper deduction under the provisions of Section 162 of Internal Revenue Code. [R. 31.]

On September 2, 1948, appellants filed with The Tax Court of the United States their petition appealing from the Commissioner's determination. Thereafter on motion duly made and granted, appellants filed an amended petition with said Court alleging in addition to those things alleged in the original petition that appellants had prior to the filing of said amended petition paid to the Collector of Internal Revenue for the Sixth Collection District of California the deficiency determined by the Commissioner as aforesaid, together with interest thereon computed to the date of payment. [R. 14.] After a hearing before that Court it entered its decision in favor of the Commissioner on March 30, 1951. [R. 140.]

Specification of Errors.

1. The Court erred in holding as a matter of law that appellants were not entitled in the computation of taxable net income for the taxable year 1945, to deduct from gross income under Section 162 of the Internal Revenue Code, the sum of \$80,517.00 distributed by them to the Testamentary Trustees during the fiscal year ended April 30, 1945.

2. The Court erred as a matter of law in concluding that the sum of \$80,517.00 owed Ralph R. Huesman at the time of his death as bonus and paid by Desmond's to the executors of his estate was within the meaning of Section 126 of the Internal Revenue Code an item of gross income but was not an item of gross income within the meaning of Section 162(a).

3. The Court erred as a matter of law in concluding that the Will of Ralph R. Huesman, deceased, did not authorize the executors of his estate to distribute the sum of \$80,517.00 as income, said sum constituting a bonus due him at the time of his death for services rendered to Desmond's paid to the executors of his estate and distributed by them during the fiscal year ended April 30, 1945.

4. The Court erred in holding that for the fiscal year ended April 30, 1945, the Estate of Ralph R. Huesman, deceased, was liable for Federal income tax in the amount of \$57,923.50 on account of the inclusion within its taxable net income of the sum of \$80,517.00 bonus received and distributed by the executors during said year, whereas if any entity was taxable on account of said item, it was the Testamentary Trust under the Will of the said Ralph R. Huesman.

5. The Court erred in failing to find that during the fiscal year ended April 30, 1945, the executors of the Estate of Ralph R. Huesman, deceased, paid or permanently set aside the sum of \$80,517.00 of gross income of the estate pursuant to the terms of decedent's Will to be used exclusively for religious, charitable, scientific, literary and educational purposes.

6. The Court erred in deciding that for the fiscal year ended April 30, 1945, the Estate of Ralph R. Huesman, deceased, was liable for a deficiency of Federal income tax amounting to \$57,923.50, or any other sum.

7. The Court erred in failing to find that appellants made an overpayment of Federal Income Tax for the taxable year 1950 in the amount of \$71,459.35.

Summary of Argument.

The Tax Court's decision is erroneous in its determination that the term "gross income" as employed in Section 126 of the Internal Revenue Code properly includes the \$80,517.00 bonus due Mr. Huesman at the time of his death, but that the term "gross income" employed in Section 162(a) of the Internal Revenue Code does not include said item.

ARGUMENT.

I.

Appellants Are Entitled to a Deduction of \$80,517.00 for the Taxable Year 1945 Pursuant to Section 162(a) of the Internal Revenue Code on Account of the Distribution of That Amount Out of Gross Income of the Estate.

The bonus of \$80,517.00 owed to Ralph Huesman at the time of his death was an *income* item as the term is employed in the Internal Revenue Code, Sec. 22 I. R. C., IT 3857, 1947 C. B. 54. But since the decedent kept his books and filed his returns on a cash receipts and disbursements basis [R. 38] said item was not taxable to him on his final return but was properly included in the income reported by the executors of his estate pursuant to Section 126(a)(1)(A) which provides in applicable part as follows:

“SEC. 126. INCOME IN RESPECT OF DECEDENTS.

(a) Inclusive in Gross Income.—

(1) General Rule.—The amount of all items of gross income in respect of a decedent which are not properly includible in respect to the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received, of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;”

It was therefore an item of “*gross income*” within the meaning of Code when received by the executors. The

right to said *income* item was, however, a part of the *corpus* of the testator's *probate estate* and was properly included in said estate for *Federal Estate Tax purposes*. We emphasize this nomenclature because the proper understanding of the terms is essential to a correct decision in this case and we feel that it was partially attributable to a confusion of terms that The Tax Court arrived at an erroneous decision. We submit that *Boston Safe Deposit & Trust Co. v. United States* (U. S. D. C. Mass., 1948), 75 Fed. Supp. 884, properly analyzes and exposes the fallacies in the government's argument advanced in this case. In *Boston Safe Deposit & Trust Co. v. United States, supra*, the decedent was a member of three insurance partnerships. Pursuant to agreement the executors elected to continue the decedent's partnership participation after his death and during the years 1940 and 1941 they received and duly distributed funds arising therefrom. Having paid the tax on said income they filed claims for refund, alleging that on account of the distributions made by the estate to testamentary trustees under a residuary clause in the decedent's will they were entitled to deductions therefor under Section 162(c). Suit was instituted on the claims and the government there, as in this case, contended that the distributions were of corpus or residue of the estate and hence not deductible. The Court held in favor of the executors, saying that while it was true the amounts received arose out of the right to partnership profits constituting a part of the corpus of the Probate Estate, yet nevertheless when received said profits constituted taxable income within the meaning of Section 162(c), I. R. C. Because we wish to quote from the Court's opinion in the foregoing case at some length, we have quoted that case in the appendix hereto at page 1.

We believe that the Court there properly analyzed and defined the basic precepts that should control the determination in this case.

(a) *The Tax Court's Decision*—"Gross Income": As far as the text of the lower court's opinion is concerned it does not undertake to grapple with the language of the statute but only reviews indecisive Congressional Reports and concludes with a decision in favor of respondent. [R. 127-139.] However, the headnote of the Court's decision written and approved by the Court (16 T. C. 656) does meet the issue head-on. It states:

"Petitioners, during the taxable year, received cash constituting the payment of a bonus owing decedent at the time of his death. Under court order they immediately paid this cash over to trustees who in turn paid it to a beneficiary under the trust as a partial satisfaction of its legacy. The money was included in decedent's estate income tax return under section 126 of the Internal Revenue Code, and then deducted under section 162 of the Code. *Held*, section 126 is a remedial provision enacted for the benefit of a decedent in connection with his final income tax return, and relates to income earned by a decedent but not as yet received at the time of his death; while section 162 refers to income earned by an estate during its administration, and does not apply to items which are income merely because of section 126. Therefore, the deduction, under section 162, was incorrect."

Appellants submit that whatever may be its basis the decision of The Tax Court is erroneous. If the decision is predicated upon Congressional Reports we submit that such reports are irrelevant because they do not consider the problem presented here and for that reason are wholly

indecisive. On the other hand, if the decision is predicated upon the proposition stated above in the headnote then we submit that the decision is clearly erroneous as a matter of law.

Section 162(a) of the Internal Revenue Code provides as follows:

“SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(a) there shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) *any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;”* (Emphasis supplied.)

In its introductory clause the above section states that there shall be allowed as a deduction “*any part of the gross income*” which is distributed as therein specified. Unquestionably the \$80,517.00 distributed by the estate was an item of “*gross income.*” (Sec. 126, I. R. C.; *Boston Safe Deposit & Trust Co. v. United States, supra.*) So far The Tax Court agrees. But, says The Tax Court, the term “*gross income*” as employed in Section 126 is

not the same as the term "*gross income*" used in Section 162(a). At that point appellants part company with The Tax Court for as the Supreme Court has said, "In the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined" (*Pampanga Sugar Mills v. Wenceslao Trinidad*, 279 U. S. 211, 218, 49 S. Ct. 308, 73 L. Ed. 665, 668), and "*should receive no stricter interpretation in the exemption because used to define an exemption.*" (*Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 150, 64 S. Ct. 474, 88 L. Ed. 635, 640. Italics supplied.)

Neither the appellee nor The Tax Court questions the propriety of appellant's including the \$80,517.00 in reportable "gross income." If the item was "gross income" for that purpose then appellants submit it was "gross income" for the purpose of Section 162(a).

(b) *The distribution of the \$80,517.00 item otherwise qualified under Section 162(a) as a deduction:*

Section 162(a) goes on to provide that there shall be allowed as a deduction any part of the gross income "which pursuant to the terms of the will . . . is during the taxable year paid or permanently set aside for the purposes and in the manner specified in Section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes" Upon petition by the executors the Superior Court exercising probate jurisdiction directed that "upon receiving said certain sum of \$80,517.00 from Desmond's a corporation, specifically as compensation due to the decedent in the form of a bonus at the time of his death, [the executors] shall deliver said specific sum to the testamentary trustees" [R.

106] and the Court further directed the trustees to make delivery thereof “as a specific sum to Loyola University of Los Angeles Regents’ Fund.” [R. 106.] Payment was accordingly made as directed. [R. 107.] Clearly therefore this item of gross income was permanently set aside and paid pursuant to the terms of the will and the Court’s order interpreting the will for the educational purposes specified in Section 162(a). [R. 33.]

In this regard we call attention to the fact that the Superior Court’s construction of the will and its orders (which it is stipulated were in no sense collusive [R. 34]) are for the purposes here in issue binding upon this Court. (*Uterhart v. U. S.*, 240 U. S. 598, 36 S. Ct. 416, 60 L. Ed. 819; *Roberts v. Lewis*, 153 U. S. 367, 14 S. Ct. 945, 38 L. Ed. 747; *Daly’s Lessee v. James*, 8 Wh. 495, 5 L. Ed. 670.)

Insofar as Section 162(a) is concerned therefore *Old Colony Trust Company v. Commissioner*, 301 U. S. 379, 57 S. Ct. 813, 81 L. Ed. 1169, is controlling. In that case an *inter vivos* trust having life annuitants, remainder to charities, *authorized* the trustees to make discretionary payments to charities whenever this could be done without jeopardizing the annuities and, after the death of the survivor annuitant, *directed* the trustees to distribute the residue among charities. During 1931, the trust had net income of some \$164,000, paid \$22,350 to annuitants and \$190,000 to charities. The trust claimed a deduction under Section 162(a) which the Commissioner and the First

Circuit disallowed on the theory that, since the trustees were merely *authorized* and not *required* to make the \$190,000 payment to charities, the payment was not *pursuant* to the will. The Supreme Court reversed, stating (p. 382):

“Under Section 162 . . . is it necessary that the will or deed creating a trust definitely direct the charitable contributions which are claimed as deductions?

* * * * *

“We are asked to hold that the words ‘pursuant to’ mean directed or definitely enjoined. And this notwithstanding the admission that Congress intended to encourage charitable contributions by relieving them from taxation . . .

“‘Pursuant to’ is defined as ‘acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.’

“The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary. . . .

“The questioned donations were made by the petitioners in pursuance of the trust deed.”

In this connection it should be noted that the distribution in the case at bar was ordered under the *residuary* legacy of the will which authorized the distribution of principal or income in satisfaction of the legacy. Hence the Court could properly, as it saw fit to do, direct that this item of “gross (taxable) income” be applied in par-

tial satisfaction of the legacy. (*Commissioner v. Crawford* (C. C. A. 3rd, 1943), 139 F. 2d 616; *Boston Safe Deposit & Trust Company v. U. S.* (U. S. D. C. Mass.), 75 Fed. Supp. 884; *Estate of Ida White*, 41 B. T. A. 525; *Estate of Robert Harwood*, 3 T. C. 1104.

Accordingly appellants submit that the bonus item in question was with respect to decedent's estate an item of "gross income" which was, within the meaning of the statute, "pursuant to the terms of the will" paid to a charitable institution and is therefore deductible.

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APPENDIX.

In *Boston Safe Deposit & Trust Co. v. United States* (U. S. D. C. Mass., 1948), 75 Fed. Supp. 884, in holding that the executors of a decedent's estate were entitled to deductions under Section 162(c), I. R. C., for profits arising from a partnership interest held by the estate the court said in applicable part:

“(1) The right to share in the partnership profits was an asset of the testator's estate and was a part of the corpus of the estate. However, the amounts actually received from the partnership as a share of the profits was income to the estate. *Bull v. United States*, 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421.

“Counsel for the government contend that the partnership profits were paid over to the trustees and distributed to the beneficiaries as a part of the corpus of the estate, and not as income. They point out that in the accounts of the executors and trustees which were approved and allowed by the Probate Court, these sums were referred to as principal and not as income. They, therefore, assert that since the state court has approved and allowed the payments as ‘out of principal,’ the plaintiffs cannot now assert that they were income, since this court is conclusively bound to follow the determination by the state court.

“(2) It is true that a federal court must apply state law in determining what persons are qualified to inherit property within that jurisdiction, the right

of a person to make a testamentary disposition of property, the conditions essential to the validity of wills or the construction of wills. Also the state establishes the procedure governing the probate of wills and the processes of administration. *Cf.* *Lyeth v. Hoey*, 305 U. S. 188, 193, 59 S. Ct. 155, 158, 83 L. Ed. 119, 119 A. L. R. 410. But 'In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls * * *.' *Lyeth v. Hoey, supra*.

"(3) Thus, in determining whether specific sum of money is a part of the net income of an estate or is a part of the residuary corpus, this court is bound by neither the classification made by the executor, nor the fact that the executor's classification is approved by the state court. *Cf.* *Osburn California Corporation v. Welch, Collector of Internal Revenue*, 9 Cir., 39 F. 2d 41. In the instant case, it is immaterial that the accounts of the executors-trustees, approved by the Probate Court, referred to the payments in question as payments out of principal. The important question here is whether they constituted payments out of income within the meaning of Sec. 162(c), 26 U. S. C. A. Int. Rev. Code.

"(4) In my opinion, the right to share in the partnership profits was a chose in action which was a part of the residue of the testator's estate. However,

the actual payments by the partnership to the executors of the share of the annual profits of the partnership constituted income to the estate. Thus, when the executors paid over these sums to themselves as trustees, or in effect to the beneficiaries, they were paying over income and not principal. It was income derived from the chose in action which was a part of the residue. As such, it was deductible from the income of the estate for income tax purposes, in accordance with Sec. 162(c) of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code, §162(c)."

No. 13006

**In the United States Court of Appeals
for the Ninth Circuit**

**ESTATE OF RALPH R. HUESMAN, DECEASED, NURMA W.
HUESMAN, FRED B. HUESMAN AND THE FARMERS &
MERCHANTS NATIONAL BANK OF LOS ANGELES, EXECU-
TORS, PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

ELLIS N. SLACK,

Acting Assistant Attorney General.

A. F. PRESCOTT,

CAROLYN R. JUST,

Special Assistants to the Attorney General.

FILED

FEB 25 1952

PAUL P. O'BRIEN

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**In the United States Court of Appeals
for the Ninth Circuit**

ESTATE OF RALPH R. HUESMAN, DECEASED, NURMA W.
HUESMAN, FRED B. HUESMAN AND THE FARMERS &
MERCHANTS NATIONAL BANK OF LOS ANGELES, EXECU-
TORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 126-139) is reported in 16 T.C. 656.

JURISDICTION

The petition for review (R. 141-144) involves a deficiency in federal income taxes for the fiscal year

ended April 30, 1945, in the amount of \$57,923.50. A fiduciary income tax return for the taxable year was filed by the taxpayer estate with the Collector of Internal Revenue for the Sixth District of California. (R. 36.) On August 3, 1948 (R. 14), the Commissioner of Internal Revenue mailed a notice of deficiency to the taxpayers, advising them of a deficiency in income tax for the taxable year ended April 30, 1945, in the amount of \$57,923.50 (R. 29-32). Within ninety days thereafter, on September 2, 1948, the taxpayers filed a petition with the Tax Court of the United States for a redetermination of the deficiency under Section 272 of the Internal Revenue Code. (R. 5-10.) On June 7, 1950, taxpayers filed an amended petition to show payment on June 7, 1949, of the deficiency determined, plus accrued interest, which amount taxpayers alleged was an overpayment made after the mailing of the notice of deficiency. (R. 14-32.) The decision of the Tax Court finding a deficiency in income tax for the fiscal year ended April 30, 1945, in the amount of \$57,923.50, was entered on March 30, 1951. (R. 140.) The case is brought to this Court by a petition for review filed by the taxpayers on June 4, 1951 (R. 141-144), pursuant to the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Among the claims filed and allowed against decedent's estate was one of Desmond's, a corporation, ~~allowed~~ in the sum of \$30,562.06, representing the balance of

mutual accounts between Desmond's and the decedent. The net amount was derived by deducting from decedent's promissory note, advances to him on open account, and interest, the sum of \$80,517 compensation due decedent in the form of bonus at date of death. Under uncontested state court orders the executors were authorized to, and did, borrow \$110,000 which they used to pay Desmond's the full \$111,079.06. They on the same day received from Desmond's the sum of \$80,517, which under order of the court they distributed to themselves as trustees, who in turn under the same order distributed it to Loyola University in partial satisfaction of its bequest.

The question presented is whether the \$80,517 is deductible under Section 162 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are printed in the Appendix, *infra*.

STATEMENT

The facts as stipulated by the parties (R. 32-38) and as so found and incorporated in the opinion of the Tax Court (R. 127-139) may be summarized as follows:

Ralph R. Huesman, a resident of California, died testate on May 3, 1944, leaving an estate of about four million dollars. Decedent's will was admitted to probate by order of the Superior Court of Los Angeles, on June 14, 1944. The decedent provided for alternative distributions of his property based upon the size of his

estate. Under the terms of the will which became operative, all of decedent's property was placed in trust. (R. 127.) Since the estate exceeded \$250,000, the provisions of the will involved in the instant case are as follows (R. 41, 54, 57-58, 128-129):

Article V.

I give, devise and bequeath all the rest, residue, and remainder of my estate, real, personal and mixed, of every kind and nature and wherever situated, which I may own at the time of my death, and all other property over which I may have any power of disposition (all of said property being hereinafter referred to as the "Trusteed Property"), to the Trustees hereinafter named, to have and to hold upon the following trusts and conditions:

E * * *

5. The Trustees shall pay and distribute a sum of money equal to ten per cent (10%) of the Trusteed Property as follows: To my friend Dr. Henry M. Rooney, and if he be deceased to his wife, Mrs. May Rooney, the sum of Two Thousand Dollars (\$2,000.00); to my loyal secretary and employee Leonora Zinner, the sum of Two Thousand Dollars (\$2,000.00); and to Mrs. Gregory Haran, my former secretary who rendered very loyal service to me, the sum of Two Thousand Dollars (\$2,000.00); * * * and the balance of said sum of money shall be paid and distributed by the Trustees to the following named organizations and in the proportions as follows: To Loyola University of Los Angeles, Regents' Fund, five-tenths (5/10th); * * *. Such conversion of Trusteed Property into money

and payments and distributions made to said organizations shall be made by the Trustees within five (5) years after distribution to the Trustees and shall be made at such time and in such amounts as may be convenient for the Trustees in consideration of the condition of the Trust Estate, and the Trustees may exercise in their sole discretion as to when and in what amounts such payments and distributions shall be made within said period of five (5) years. * * *

At the time of his death, decedent was president of Desmond's, a retail merchandising corporation carrying on business in southern California. There was due and owing decedent from Desmond's at the time of his death, the sum of \$80,517 as a bonus for services rendered by him prior to his death. This amount was included in the federal estate tax return as part of the gross estate under Section 811 of the Internal Revenue Code, as the value of decedent's claim against Desmond's. (R. 129.)

On April 10, 1945, the executors of the decedent's estate, in that capacity and their capacity as testamentary trustees, petitioned the appropriate court for instructions, and at the same time filed a petition requesting an order for partial distribution. (R. 129.)

In the petition for instructions the following allegations appeared (R. 82, 83-85, 129-130):

VI

Among the claims filed and allowed is that of Desmond's, a corporation, which has been allowed in the sum of \$30,562.06, representing the balance

of mutual account between Desmond's and the decedent, as follows:

Promissory note due Desmond's	\$ 80,283.30
Interest on note to date of death	3,231.20
Advances on open account	27,094.51
<hr/>	
Total due Desmond's at date of death	110,609.01
Plus additional interest on note to date of claim	470.05
<hr/>	
Total due Desmond's at date of claim	111,079.06
Less Compensation due decedent in form of bonus at date of death	80,517.00
<hr/>	
Net amount due Desmond's and allowed as a claim	30,562.06

* * * * *

VIII

* * * One of said beneficiaries is Loyola University of Los Angeles, Regents' Fund, which is entitled to a sum of money equal to approximately 5% of the Truited Property, amounting to approximately \$98,000.00.

IX

Loyola University is an educational institution located in Los Angeles, California. Said institution is in need of cash funds and desires a partial distribution of the bequest in its favor under decedent's will in the amount of said bonus, to wit, the sum of \$80,517.00.

On April 10, 1945, concurrent with the other petitions, the executors requested an order to borrow \$110,-

000 for three months on an unsecured note. (R. 130-131.)

On April 30, 1945, the court entered its order, ordering the executors to borrow the \$100,000, to pay the same to Desmond's, and to receive from Desmond's the \$80,517. Throughout its orders, the court referred to the \$80,517 specifically as compensation due decedent in the form of a bonus at the time of his death. The executors were ordered to pay this specific sum to the testamentary trustees who in turn were ordered to pay the same specific sum to Loyola University, Regents' Fund, as the ultimate beneficiary under the trust, in partial satisfaction of its legacy, which was approximately \$98,000. (R. 131.)

On the same day, April 30, 1945, Desmond's paid the \$80,517 to the executors, who paid it to the testamentary trustees, who in turn paid it to Loyola University, Regents' Fund. At the same time the testamentary trustees received and distributed the \$80,517 it constituted the only cash asset of the trust estate. The taxpayer estate also borrowed \$110,000 on a three-month unsecured note from the Farmers and Merchants National Bank of Los Angeles (an executor and trustee of the estate) on April 30, 1945. This sum was repaid on July 30, 1945. The \$110,000 so borrowed was applied to pay Desmond's claim against the estate of \$111,079.06. (R. 131.)

In all accounting records of the estate and the trust, the \$80,517 was treated as principal, i.e., as a receipt of, and distribution of, principal. (R. 131.)

In its federal income tax return for the year ended April 30, 1945, the taxpayer estate reported the \$80,517

item as income of the estate under Section 126(a)(1) (A) of the Internal Revenue Code. It deducted \$37,359.89¹ on its 1945 return as the amount of estate tax attributable to the inclusion of the \$80,517 item in the federal estate tax return, as authorized by Section 126(c) of the Internal Revenue Code and deducted \$80,517 as an allowable deduction under Section 162 of the Internal Revenue Code, or deductions totaling \$117,876.89. (R. 132.)

On these facts the Tax Court held the claim which decedent's estate had against Desmond's was at all times part of the corpus of decedent's estate and when the executors transferred the amount of the liquidated claim to themselves as trustees they transferred a part of the decedent's residuary estate for distribution of the testamentary trust. The beneficiary received the corpus of the trust and not income of the trust. (R. 138-139.)

SUMMARY OF ARGUMENT

The Tax Court was correct in ruling that items which are made taxable to the recipient under Section 126 of the Internal Revenue Code are not deductible under Section 162 of the Internal Revenue Code.

The bonus was not distributable as such to either the residuary trustees or the exempt organization. Actually cash as a part of corpus was distributed to the residuary trustees, who in turn distributed it to Loyola in part payment of its legacy.

The executors in their income tax return have not only deducted the amount of the bonus, but also a

¹ The change of this amount to \$36,514.30 by the Commissioner is not contested by the taxpayer-estate.

further deduction under Section 126, as estate tax attributable to the bonus. The Commissioner has allowed the latter deduction upon the theory that the executors are taxable thereon, and are therefore entitled to the deduction. However, under the executors' theory of the case they are not entitled to the deduction for either of two reasons: (1) because Section 126 allows the deduction to the person who would be taxable thereon, if not an exempt corporation, and (2) if the item be distributable to the exempt organization as they contend, no estate tax can be attributable thereto for the reason that bequests to educational institutions are deductible for estate tax purposes.

ARGUMENT

I

Section 162 of the Internal Revenue Code Does Not Permit the Deduction of an Item Which Is Income Merely Because of the Provisions of Section 126 of the Internal Revenue Code

In view of the estate's net indebtedness to Desmond's, there is serious doubt as to whether the bonus item was actually distributed as contended. Compare *United States v. Winnett*, 165 F. 2d 149 (C.A. 9th). However, assuming arguendo that the bonus was distributed, we submit the Tax Court's ruling that the item is not deductible under Section 162 of the Internal Revenue Code (Appendix, *infra*) is correct.

It is clear that Section 162 permits deduction of income only in those instances where the distribution is includible in the income of the distributee, or would be so included if it were not for the fact that the distribu-

tee is an exempt organization. *Helvering v. Butterworth*, 290 U.S. 365, 369.² Compare *Dunlop v. Commissioner*, 165 F. 2d 284 (C.A. 8th); *Carlisle v. Commissioner*, 165 F. 2d 645 (C.A. 6th). Both subsections (b) and (c) specifically provide that deductions allowed thereunder shall be included in computing the income of the distributee. Such provision is not necessary under subsection (a) because the distributees included in that subsection are exempt from income tax.

That Section 126 income is not deductible under Section 162 becomes apparent from a reading of the former section. That section specifies the estate or person who is to include the item in computing its or his income. Subsection 126(a)(1)(A) of the Internal Revenue Code (Appendix, *infra*) provides that income due decedent at death shall be included in the income of the estate of the decedent if the right to receive it is acquired by the estate from the decedent; subsection (B) provides that the person who by reason of the death of the decedent acquires the right to receive such an item shall include it in his income, "if the right to receive the amount is not acquired by the decedent's estate"; and subsection (C) provides that the person who acquires from a decedent the right to receive such an item by bequest, devise or inheritance shall include it in his income, "if the amount is received after a distribution by the decedent's estate of such right."

² While Sections 22(b)(3) and 162(b) of the Internal Revenue Code (Appendix, *infra*) were amended subsequent to this decision, the amendments include in the income of the distributee only those gifts, bequests, devises, or inheritances, payment, crediting or distribution of which is to be made at intervals "under the terms of the gift" etc., to the extent that it is paid out of income from the property.

As the amount in question here was received prior to distribution, it is apparent that it could not be included in the income of any legatee to whom it might be distributed; that is to say, either the trustee or Loyola, even if it had not been an exempt organization.

Further, Section 126(c) allows a deduction for the amount of *estate taxes* attributable to the inclusion of such an item in the decedent's estate. Clearly Congress intended that this deduction should be allowed to the one who is required under the section to include the item in income; yet, under taxpayers' theory, an estate that receives the item and distributes it may take this deduction plus a deduction under Section 162, while a taxable distributee must include the whole item in his income with no deduction.

The decision of the Tax Court is supported by the history of Section 126. Section 42 of the Revenue Act of 1934, c. 277, 48 Stat. 680, required all income accrued up to the date of death, not otherwise properly includible for such period or a prior period, to be included in the income tax return of a decedent for the period ended by his death. The provision was enacted because the courts had held under the prior law that income accrued before death but received by the estate was not income to the estate but a part of the corpus. Hence, prior to this provision of the Revenue Act of 1934 neither the estate nor the decedent ever paid income tax on such amounts.

The Supreme Court held in *Helvering v. Enright*, 312 U.S. 636 (1941), and *Pfaff v. Commissioner*, 312 U.S. 646 (1941), that this provision of the Revenue Act of

1934 required the inclusion in a decedent's last return of all income earned by him to that date, even though it had not accrued in an accounting sense. This often resulted in hardship, as amounts which ordinarily would have been received over a number of years were returnable in one period, thus carrying the income into higher brackets.

To alleviate this hardship Section 126 was enacted, to provide that income accruing to a person because of his death was not includible in his final return, but was to be treated as income and reported as income by the one who became entitled to receive it. Hence, Section 126 was enacted for the express purpose of relieving a hardship while at the same time preventing income of this type from escaping taxation. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 83-88 (1942-2 Cum. Bull. 372, 435-439); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 100-105 (1942-2 Cum. Bull. 504, 579-583).

Loyla, the exempt organization to which through the trustees the \$80,517 was paid, was one of the residuary legatees. The will directed that it be paid 5% of the residuum. The court order under which the cash was paid properly treated the item as corpus in directing its distribution to the trustees; and so treated it in simultaneously directing the trustees to distribute the item to Loyola in part payment of its legacy.

As the Tax Court pointed out (R. 139), this position is supported by the cases holding that where capital gains are distributed by an estate, such distributions are not deductible as payment of income under Section 162 where either the will or the law of the state having

jurisdiction provides that such gains constitute corpus. *Simon v. Hoey*, 88 F. Supp. 754 (S.D.N.Y.), affirmed, 180 F. 2d 354 (C.A. 2d); *In re Rogers' Estate*, 143 F. 2d 695 (C.A. 2d), certiorari denied, 323 U.S. 780; *Weigel v. Commissioner*, 96 F. 2d 387 (C.A. 7th); cf. *Carlisle v. Commissioner*, 165 F. 2d 645 (C.A. 6th).

Boston Safe Deposit & Trust Co. v. United States, 75 F. Supp. 884 (Mass.), is not to the contrary. That case involved income earned after the decedent's death. It should also be noted that the court held that in determining whether a specific sum of money is a part of the income of the estate or is part of the residuary corpus, the court is not bound by the classification made by the executor, nor by the fact that the executor's classification is approved by the state court.

Further supporting the Tax Court's conclusion that only income earned by the estate is deductible under Section 162 of the Internal Revenue Code is taxpayers' claim that under the two sections they are entitled to a deduction of over \$117,000 because of the item of \$80,-517. That is, they claim full deduction for the distribution of the item under Section 162(a) as a distribution to an exempt organization, plus the amount of estate tax allegedly attributable to the item. This, notwithstanding the fact that bequests to educational institutions are exempted from estate taxes under Section 812(d) of the Internal Revenue Code (Appendix, *infra*). This question will be discussed more at length *infra*.

II

The Item Is Not Deductible under Section 162(a)

While under specifications of errors taxpayers contend the item in question is deductible under Section 162, their brief discusses only their contention that it is deductible under subsection (a) thereof.

Section 162(a) permits the deduction of income distributed to educational institutions. We submit, however, that this deduction is limited to the share of the income of the estate to which the distributee is entitled under the terms of the will. Compare *Wellman v. Welch*, 99 F. 2d 75 (C.A. 1st).

The cases cited on taxpayers' brief (p. 18) do not stand for the proposition that where, as here, there are taxable beneficiaries who are entitled to the bulk of the residuum, and a non-taxable beneficiary entitled to only 5% thereof, an executor may distribute 100% of an item of income to the non-taxable beneficiary in part payment of its legacy, and deduct the full income as having been paid to charity, even though the state court order directing distribution be drawn, as here, with meticulous care. This is especially true where the order itself recognizes that it is authorizing the distribution of corpus.

Legatees of given percentages of a residuum take proportionately of both corpus and income. In filing their final accounts the executors must credit each of the residuary legatees with his share of the income. In the final account all residuary legatees must receive an amount which reflects the income. See *Grey v. Commissioner*, 118 F. 2d 153 (C.A. 7th). Compare *United*

States v. Benedict, 338 U.S. 692; *Warburton v. Commissioner*, decided February 7, 1951 (1951 P-H T.C. Memorandum Decisions, par. 51,036), affirmed *per curiam*, February 5, 1952 (C.A. 3d); and *Clarke v. United States*, 94 F. Supp. 543 (E.D. Pa.), affirmed, 189 F. 2d 101 (C.A. 3d).

The cases cited ^{on} ~~in~~ taxpayer's brief do not support their contention that an item of gross income may be applied in its entirety as such in partial satisfaction of a residuary legacy of a small portion of the residuum. In *Commissioner v. Crawford's Estate*, 139 F. 2d 616 (C.A. 3d), there were two residuary legatees, the wife and the daughter of the decedent. The court there stated (p. 618):

We think that it must be concluded that the \$175,000 paid to the trust was income which had accumulated upon that part of the corpus in the residuary estate which was transferred by the executors to the Martha Sharp Crawford trust for the orphans' court so treated it. It is clear that the \$175,000 accumulated upon the property in the executors' hands after the death of the testator and that all the income belonged to one or the other of the two trusts, the trust of the minor or that of her mother. The identity between principal and interest was preserved by the executors in their treatment of the estate. The payments of principal and interest were approved by the orphans' court. The decrees of that court are binding in the case at bar with respect to the meaning and effect of the will. * * *

In *Estate of Hurwood v. Commissioner*, 3 T.C. 1104, also cited by the taxpayers, the Tax Court said (p. 1108):

If so, the facts in this case will differ in no substantial respect from those before the court in *Commissioner v. Crawford's Estate*, *supra*. Moreover here, as in that case, the income and the corpus were kept separate, both by the executors and by the trustees. * * *

In *Estate of White v. Commissioner*, 41 B.T.A. 525, the Tax Court said (p. 531):

The record is clear that the income fund under discussion was received by the petitioners as income, was so treated by the depository bank, and was so paid over to the trustees under a proper order of the Probate Court. Its character and identity as income were thus established and maintained by all persons connected with the transactions. The stipulation itself so brands it.

Here, the state court properly treated the sum it directed to be paid to Loyola as a part of the corpus of the estate.

Nor is *Old Colony Co. v. Commissioner*, 301 U.S. 379, in point. There, the trust authorized the trustees to pay trust *income* to charities whenever for a period of one year the trust fund had yielded a net income equal to twice the amount of the annuities, and upon the death of the survivor of the annuitants, directed the distribution of the residue to charities. The question there was whether it must be shown that amounts paid

out of income to charities were actually paid out of income received during the year in which they were paid.

Taxpayers' position, if correct, would attribute to Congress the intent to leave to the whim of executors or trustees the taxability or non-taxability of income. Certainly Congress did not intend that executors or trustees be permitted absent provision in the will to distribute income to one residuary legatee in payment of his legacy and make him subject to income tax thereon, while distributing the corpus to another and relieving him of all income tax thereon. This clearly would be contrary to Section 22(b)(3) (Appendix, *infra*) which excludes from income bequests which are not bequests of income from property, and includes the bequest only "if, under the terms of the * * * bequest * * *, payment, crediting, or distribution thereof is to be made at intervals, to the extent that it is paid * * * out of income from property, * * *."

III

Even Upon Taxpayers' Own Theory of the Case They Are Not Entitled to a Deduction under Both Section 126 and Section 162

Taxpayers in their income tax return took a deduction under Section 126 for the amount of estate taxes allegedly attributable to the bonus which they now contend was distributable to charities; and for which they also claim a deduction of the full amount of the bonus under Section 162(a). Thus, the taxpayers claim a deduction of \$117,031.30 because of an item of income of \$80,517. Certainly Congress did not intend to allow such a double deduction.

The Commissioner has allowed the deduction claimed under Section 126 (R. 31) upon the theory that such a deduction is allowable to the one who must under that section pay the income tax thereon. But, if it be assumed, as the taxpayers contend, that the item was distributable to Loyola pursuant to the terms of the will, no estate tax could properly be attributable to that item since under Section 812(d) amounts distributable to exempt organizations are deductible for estate tax purposes. The item was properly includible in the estate tax return. However, a deduction was also allowable because of the bequest to the educational institution. Hence, if the item be a part of the bequest to the educational institution a deduction therefor was allowable in the estate tax return, and no estate tax could be attributable to it.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Special Assistants to the Attorney General.

FEBRUARY, 1952.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever. * * *

* * * * *

(b) *Exclusions from Gross Income*.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) [As amended by Sec. 111(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Gifts, bequests, devises, and inheritances*.—The value of property acquired by gift, bequest, devise, or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. For the purposes of this paragraph, if, under the terms of the gift, bequest, devise, or inheritance, payment, crediting, or distribution thereof is to be made at intervals, to the extent that it is paid or

credited or to be distributed out of income from property, it shall be considered a gift, bequest, devise, or inheritance of income from property;

* * * * *

(1) [As added by Sec. 134(c) of the Revenue Act of 1942, *supra*]. *Income of Decedents*.—For inclusion in gross income of certain amounts which constituted gross income in respect of a decedent, see section 126.

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 126 [As added by Sec. 134(e) of the Revenue Act of 1942, *supra*]. INCOME IN RESPECT OF DECEDENTS.

(a) *Inclusion in Gross Income*.—

(1) *General rule*.—The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received, of:

(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;

(B) the person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or

(C) the person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right.

(2) *Income in case of sale, etc.*—If a right, described in paragraph (1), to receive an amount is transferred by the estate of the decedent or a person who receives such right by reason of the death of the decedent or by bequest, devise, or inheritance from the decedent, there shall be included in the gross income of the estate or such person, as the case may be, for the taxable period in which the transfer occurs, the fair market value of such right at the time of such transfer plus the amount by which any consideration for the transfer exceeds such fair market value. For the purposes of this paragraph, the term “transfer” includes sale, exchange, or other disposition, but does not include a transfer to a person pursuant to the right of such person to receive such amount by reason of the death of the decedent or by bequest, devise, or inheritance from the decedent.

(3) *Character of income determined by reference to decedent.*—The right, described in paragraph (1), to receive an amount shall be treated, in the hands of the estate of the decedent or any person who acquired such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such person in the transaction by which the decedent acquired such right; and the amount includible in gross income under paragraph (1) or (2) shall be considered in the hands of the estate or such person to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.

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(c) *Deduction for Estate Tax.*—

(1) *Allowance of deduction.*—A person who includes an amount in gross income under subsection (a) shall be allowed, for the same taxable year, as a deduction an amount which bears the same ratio to the estate tax attributable to the net value for estate tax purposes of all the items described in subsection (a) (1) as the value for estate tax purposes of the items of gross income or portions thereof in respect of which such person included the amount in gross income (or the amount included in gross income, whichever is lower) bears to the value for estate tax purposes of all the items described in subsection (a) (1).

* * * *

(26 U.S.C. 1946 ed., Sec. 126.)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(b) [As amended by Sec. 111(b) of the Revenue Act of 1942, *supra*] There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

(26 U.S.C. 1946 ed., Sec. 162.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen

or resident of the United States by deducting from the value of the gross estate—

* * * *

(d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers, to or for the use of * * * any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * or to a trustee or trustees, * * * exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.

(26 U.S.C. 1946 ed., Sec. 812.)

California Probate Code (Deering, 1949):

§ 571. *Duties of executor, etc.: Surviving partner.* The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. When, at the time of his death, a partnership existed between the decedent and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account to the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon application of the executor or administrator, the court or a judge thereof, whenever it appears necessary, may order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator

may maintain against him any action which the decedent could have maintained. * * *

§ 600. *Inventory and appraisement.* Within three months after his appointment, or within such further time as the court or judge for reasonable cause may allow, the executor or administrator must file with the clerk of the court an inventory and appraisement of the estate of the decedent which has come to his possession or knowledge together with a copy of the same which copy shall be transmitted by said clerk to the county assessor. The inventory must include the homestead, if any, and all the estate of the decedent, real and personal, particularly specifying all debts, bonds, mortgages, deeds of trust, notes and other securities for the payment of money belonging to the decedent, with the name of each debtor, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and a statement of the interest of the decedent in any partnership of which he was a member, to be appraised as a single item. It must include an account of all moneys belonging to the decedent. If the whole estate consists of money in the hands of the executor or administrator, there need not be an appraisement, but an inventory must be made and returned as in other cases. * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.126-1. *Inclusion in gross income of income in respect of a decedent.*—

* * * * *

Under section 126(a)(1), all such amounts to which a decedent is entitled as gross income and which are not includible in computing his net income for his last taxable year or any prior taxable

year shall be included, when received, in the gross income of the estate of the decedent or of the person receiving such amounts if such amounts are received in a taxable year ending after December 31, 1942, by the estate of the decedent or by a person entitled to such amounts by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent. These amounts are included in the income of the estate and such persons when received by them, regardless of whether or not they report income on the basis of cash receipts and disbursements.

The persons who are placed with respect to such amounts in the same position as the decedent are the decedent's estate (which in the great majority of cases will be the one who receives such amounts) and, if the estate does not collect such amounts but distributes the right to receive such amounts to the heir, next of kin, legatee, or devisee who inherited or was bequeathed or devised such right, such heir, next of kin, legatee or devisee. Thus, if the decedent who kept his books on the basis of cash receipts and disbursements was entitled at the date of his death to a large salary payment to be made in equal annual installments over five years, and his estate after collecting two installments distributed the right to the remaining installment payments to the residuary legatee of the estate, the estate must include in its gross income the two installments received by it, and the legatee must include in his gross income each of the three installments received by him.

* * * * *

Since section 126 provides for the treatment of such amounts as income to the estate and other persons placed in the same position as the decedent

with respect to such amounts, the provisions of section 113(a)(5) with respect to the basis of property acquired by bequest, devise, or inheritance do not apply to these amounts in the hands of the estate and such persons. Furthermore, section 126 only applies to the amount of items of gross income in respect of a decedent, and items which are excluded from his gross income under section 22(b) or section 116 are not within the provisions of section 126.

* * * * *

The right to receive an amount of income in respect of a decedent shall be treated in the hands of the estate or the person entitled to receive such amount by bequest, devise, or inheritance from the decedent or by reason of his death as if it had been acquired in the transaction by which the decedent acquired such right, and shall be considered as having the same character it would have had if the decedent had lived and received such amount. The estate or such person is placed in the same position with respect to the nature of this income as the position the decedent enjoyed. Thus, if the income would have been capital gain to the decedent, if he had lived and had received it, from the sale of property held for more than six months, the income when received, or its fair market value if transferred, shall be treated in the hands of the estate or of such person as gain from the sale of the property, held for more than six months, in the same manner as if such person had held the property for the period the decedent held it, and had made the sale. Similarly, if the income is interest on United States obligations owned by the decedent, such income shall be treated as interest on United States obligations in the hands of the person re-

ceiving it, for the purpose of determining the credit provided by section 25(a)(1) and (2), as if such person owned the obligations with respect to which such interest is paid. If the amount would have constituted earned income to the decedent, as in the case of the accrued wages of a decedent who reported income on the basis of cash receipts and disbursements, such amount shall constitute earned income to the person including such amount in his gross income to the same extent as if he had engaged in place of the decedent in the transaction in which the amount was earned. Such earned income would be included with the other earned income of such person, in determining his earned income credit, and such aggregate would of course be subject to the limitations on such credit. The estate is not allowed any credit for such income which is treated as earned income in its hands, since there is no provision in Supplement E (sections 161 to 172, inclusive) allowing such a credit in the case of an estate. * * *

* * * * *

SEC. 29.162-1 [As amended by T. D. 5458, 1945 Cum. Bull. 41, 47]. *Income of Estates and Trusts*.—In ascertaining the tax liability of the estate of a deceased person or of a trust, there are deductible from the gross income, subject to exceptions, the same deductions which are allowed to individual taxpayers. * * *

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

(a) Any part of the gross income of the estate or trust for its taxable year which, by the terms of

the will or of the instrument creating the trust, is paid or permanently set aside during such year for the charitable, etc., uses or purposes referred to or described in section 162(a). This deduction is in lieu of that authorized by section 23(o) in the case of individual taxpayers.

* * * * *

No. 13006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF RALPH R. HUESMAN, Deceased, NURMA W.
HUESMAN, FRED B. HUESMAN and THE FARMERS &
MERCHANTS NATIONAL BANK OF LOS ANGELES, Ex-
ecutors,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' REPLY BRIEF.

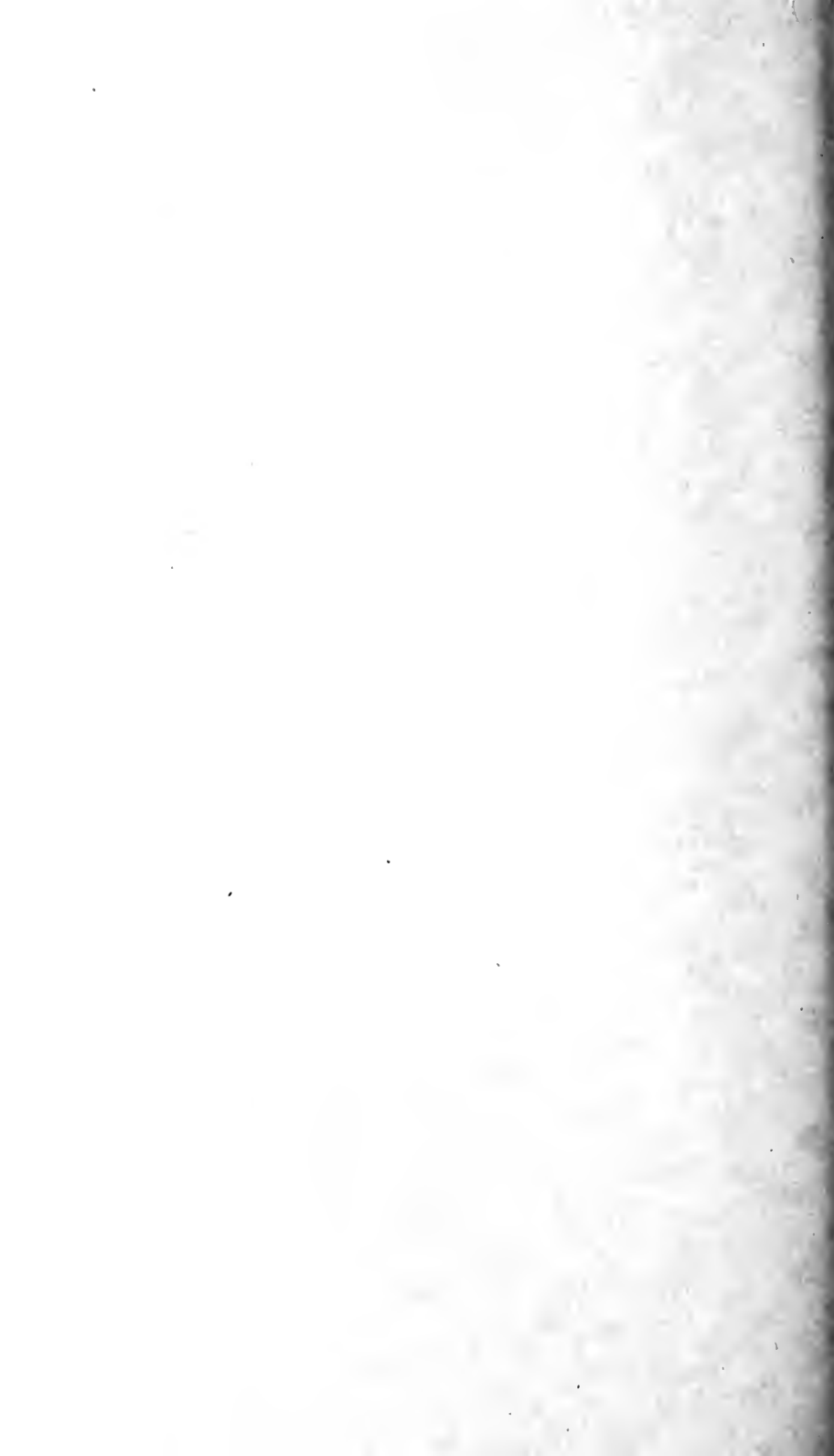
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Appellee.

APPELLANTS' REPLY BRIEF.

I.

**The Deduction Taken by Appellants Pursuant to
Section 162(a) Is Correct.**

The first point of appellee's brief is devoted to an anticipated defense based on subsections (b) and (c) of Section 162, Internal Revenue Code. Although saving our rights under the entire section we have nevertheless based this appeal on subsection (a) of Section 162 and our point is that "gross income" as defined in Section 126 means the same thing as "gross income" under Section 162(a). Consequently, the first point of appellee's brief is entirely beside the point.

We are accused of overreaching—demanding more than that to which we are entitled (Appellees Brief, p. 13).

That assumes a large conclusion. Much depends upon the perspective and point of approach. If we start with the Statute (all that a taxpayer has to guide him) and logically construe it we conclude that within the code the term "gross income" has the same meaning in Section 162(a) as in Section 126. Such being the case there should be no deficiency assessment here. Approaching the problem from the other end, however, it does appear that the taxpayer has availed itself of quite a tax advantage. That may nevertheless be, and in this case is, quite justifiable. Although dissenting in a case cited by appellee (which incidentally is not in point), Mr. Justice Frankfurter had this to say which is most apropos (*United States v. Benedict*, 338 U. S. 692, 699):

"The contrariety of views expressed by the Tax Court, the Court of Appeals for the Second Circuit, the Court of Claims and now by this Court in the task of harmonizing §§22(a), 117(b) and 162(a) of the Internal Revenue Code, 26 USCA, §§22(a), 117(b) and 162(a), FCA title 26, §§22(a), 117(b) and 162(a), conclusively proves the opaqueness, if not inherent incongruity, of those provisions. Courts must do the best they can with such materials since the power to write or rewrite legislation is not theirs. But the fact that a taxpayer may astutely apply his income so as to reduce the net base on which a tax is to be levied is not in itself ground for rejecting a construction of the Revenue Code which permits the reduced base, even though the particular mode of distributing his income may not have been contemplated in the enactment of the classes of exemptions and deductions within which the taxpayer brings himself. I, too, recoil from a bizarre result and if legislation is ambiguous its construction should avoid such a result. But the

rationale of construction ought not to be based on the impact of a single bizarre instance.

“A deduction for trust income applied to charitable purposes should not be disallowed merely because one taxpayer can effect the payment of a lower income tax than another through the mode by which the charitable contribution is made. Thus, where the trust instrument provides that all charitable donations shall be allocated from ordinary income and not from capital gains, the taxpayer may doubtless deduct such charitable contributions in full and may at the same time report any capital gains under the special capital gains provisions of the Code. This would secure the very benefits sought by the taxpayers here. The rule enunciated by the Court may therefore itself rest tax liability on the astuteness shown in drawing the trust instrument allocating income for charitable purposes.

“Since I am not alone in entertaining these doubts and they have not been dispelled, it seems appropriate to express them.”

Two motions for additional time for filing appellee's brief have been filed with this court. Both assert by way of accompanying affidavits that the Justice Department and the Bureau of Internal Revenue are considering a revision of policy which may affect this case. Apparently policy was concluded in favor of appellee's present advantage. Nevertheless, may we inform the court that recently offering to compromise this case appellants offered to settle by yielding the deduction taken for estate taxes (\$36,514.30), but that the offer was rejected unconditionally. Our position is, therefore, not the extreme one appellee would lead us to believe but rather one undertaking to find the right answer.

II.

**The Legislative History Refutes Rather Than
Supports the Commissioner's Position.**

Appellants argued in our opening brief that the distribution in issue was made pursuant to a *residuary* legacy which authorized the distribution of income (Br. p. 17). Turning to the Senate Committee's report on Section 126 of the Code we find this statement (S. Rep. No. 1631, 77th Congress, Second Session, pp. 100-105; 1942 Cum. Bull. 504, 581):

“Section 126(a)(2) of the Code, as added by subsection (e), provides that if the right to receive an amount described in section 126(a)(1) is transferred by a person described in such subsection, the fair market value of such right at the date of the transfer shall be included in the income of such person, plus the amount by which any consideration received on such transfer exceeds the fair market value of such right. Thus, if the right to receive the income is disposed of, as by gift, the donor must include the fair market value of such right in his gross income, in view of his benefit from such right. However, if the person to whom such right is transferred is a person described in section 126(a)(1) as being entitled to such right by reason of the death of the decedent (for example, the beneficiary of the trust of such right), or by bequest, inheritance or devise from the decedent (for example, a specific legatee of such right *or the residuary legatee of the estate*), the fair market value of the right is not included in the income of the transferor, but the transferee must include the amount received in his income under the provisions of section 126(a)(1), or if he transfers such right to a person not described in section 126(a)(1), then he must include the fair market value of this right in his income.” (Emphasis supplied.)

Thus the Committee Report recognized that a distribution of income could, as it was in this case, be properly made to a residuary legatee. At no place in any of the Committee Reports, however, was the question of the transfer of income to an exempt institution considered. Although the Commissioner states that he relies on the legislative history to support his position yet he nowhere quotes or specifies precisely what there is in the Committee Reports that supports him.

Addressing ourselves generally to the Commissioner's brief he states at the outset with apparent lack of conviction that there is "serious doubt" as to whether the bonus item was actually distributed. That is a matter of fact concerning which there can be no question in view of the stipulation [R. 35].

He then states that residuary legatees of given percentages of a residuum take proportionately of both corpus and income. He cites *Grey v. Commissioner*, 118 F. 2d 153, and says to "compare" *United States v. Benedict*, 338 U. S. 692; *Warburton v. Commissioner*, 1951 P-H. T. C., paragraph 51,036, and *Clarke v. United States*, 189 F. 2d 101. *Grey v. Commissioner*, the case cited primarily in support of the asserted proposition involved not a question of distributable income but of the allocation of a depreciation deduction. None of the other cases support the statement asserted. But in any event it is in this case a stipulated fact that the bonus or income item was pursuant to court order actually paid to Loyola [R. 36] all of which makes the Commissioner's argument on this

point irrelevant and also distinguishes *Wellman v. Welch*, 99 F. 2d 75 (C. C. A. 1), which did not involve a *residuary* legatee and where the parties stipulated that funds were indiscriminately applied to the payment of pecuniary legacies.

Finally, we wish to call the court's attention to the fact that the Commissioner's abstract of *Old Colony Co. v. Commissioner*, 301 U. S. 379, is not only erroneous but misleading on a very crucial point (Appellee's Brief, p. 16). The abstract states that "The trust authorizes the trustees to pay trust *income* to charities." The fact is that the trust there, as did the residuary clause in the case herein at issue, authorized the payment of *principal* or *income* to the designated purposes. Hence, it is apparent that *Old Colony Co. v. Commissioner* is directly in point on the issue for which it is cited.

Respectfully submitted,

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No. 13,006

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For the Ninth Circuit

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NURMA W. HUESMAN, FRED B. HUESMAN,
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BANK OF LOS ANGELES, EXECUTORS.

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief of Amici Curiae

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Brief of Amici Curiae

**PRELIMINARY STATEMENT OF PURPOSE
AND SCOPE OF BRIEF**

Pursuant to leave of this Court, the undersigned attorneys file this brief as amici curiae. We represent the respondent (the petitioner in the court below) in the case of *Rose J. Linde v. Commissioner of Internal Revenue* (17 Tax Court No. 63). The Commissioner of Internal Revenue on or about March 14, 1952 filed with the Tax Court of

the United States a petition for review by this Court of the decision of the Tax Court in the *Linde* case.

One of the issues involved in the *Linde* case is also present in the instant case; namely, whether a deduction for income tax purposes under Section 162 of the Internal Revenue Code is available to amounts treated as gross income solely by reason of Section 126 of the Code. The position of the respondent in the *Linde* case, like that of the respondent in the instant case, is that the Tax Court correctly determined that such deduction is *not* available.

STATEMENT OF FACTS AND APPLICABLE STATUTES

The facts of this case may be briefly summarized as follows: At decedent's death, the sum of \$80,517.00 was owed to him by his employer. The employer thereafter paid this amount to the executors of the estate. (It is conceded by both parties that this amount of \$80,517.00 is includible in the gross income of the estate under the provisions of Section 126 of the Internal Revenue Code.) Pursuant to an order of the probate court, the executors of the estate then distributed this amount to the trustees of a trust established under decedent's will, and the trustees distributed this amount to the Loyola University, Regent's Fund, in partial satisfaction of its legacy under decedent's will. In its Federal income tax return for the fiscal year ended April 30, 1945, the estate reported the \$80,517.00 as income of the estate under Section 126(a) of the Code, deducted \$37,359.89 under Section 126(c) as the amount of estate tax attributable to the inclusion of the \$80,517.00 item in the Federal estate tax return and deducted \$80,517.00 under Section 162 of the Code. The claimed deductions

attributable to this \$80,517.00 item thus totaled \$117,876.89. The Commissioner allowed the deduction under Section 126(c) but reduced the amount to \$36,514.30, and the estate does not contest this change. The Commissioner disallowed *in toto* the claimed deduction under Section 162 of the Code. On these facts, the Tax Court held that no deduction from gross income was allowable to the estate under Section 162 of the Internal Revenue Code by reason of the distribution of the sum of \$80,517.00 to the University through the trustees.

The applicable provisions of the Statutes and the Regulations are set forth in the Brief for the Respondent (pages 19-29).

ARGUMENT

Petitioners Are Not Entitled to a Deduction of \$80,517.00 for the Taxable Year 1945 Under Section 162(a) of the Internal Revenue Code.

The decision of the Tax Court is fully supported by the legislative history of Section 126. Prior to enactment of the Revenue Act of 1934, income accrued before death but received by the estate was not income to the estate but was corpus. Hence, it was not subject to income tax either to a decedent on the cash basis or to his estate. On the other hand, a decedent on the accrual basis would have paid income tax on such income as it accrued even though it was not received until after his death. Section 42 of the Revenue Act of 1934 required all income accrued up to the date of death, not otherwise properly includible for such period or a prior period, to be included in the income tax return of the decedent for the period in which fell the date of his death. This provision was enacted in order to avoid the discrimination in favor of cash-basis taxpayers and to

subject to income taxes amounts which would not otherwise be subject thereto, H. Rep. No. 704, 73d Cong., 2d Sess., p. 24 (1939-1 Cum. Bull. (Part 2) 554, 572); S. Rep. No. 558, 73d Cong., 2d Sess., p. 28 (1939-1 Cum. Bull. (Part 2) 586, 608).

However, hardship resulted in some instances under this provision as amounts which ordinarily would have been received by the decedent over a number of years were returnable in the year of death, thus carrying the income into higher brackets. To alleviate this harsh result, Section 126 of the Code was added by the Revenue Act of 1942 to provide that income accruing to a decedent by reason of his death was not includible in his final return but was to be treated as income by the one receiving the right to such income. This Section was enacted for the express purpose of relieving the hardship referred to above, while at the same time preventing the income involved from completely escaping income taxation (R. 136-138; H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 83-88 (1942-2 Cum. Bull. 372, 435-439); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 100-105 (1942-2 Cum. Bull. 504, 579-583)).

It was the intent of Congress in enacting Section 126 of the Code that amounts considered as gross income under that Section should in all respects be treated in the same manner in the hands of the estate (or other recipient) as they would have been treated in the hands of the decedent, had he collected such amounts. This is demonstrated by the following quotations from H. Rep. No. 2333 (1942-2 Cum. Bull. 372, 436-7), *supra*:

“* * * This section changes the existing law by provision that *such amounts shall not be included in the*

*decedent's income but shall be treated, in the hands of the persons receiving them, as income of the same nature and to the same extent as such amounts would be income if the decedent remained alive and received such amounts * * * when his estate or his legatee takes his place with respect to this income, it is proper to continue to treat this right in their hands in the same manner as it would be treated in the hands of the decedent.*

* * * * *

“All amounts of gross income which are not includible in the income of the decedent will, when received, be includible in the income of the person receiving such amounts by inheritance or survivorship from the decedent under section 126, to be added to the Code by subsection (e) of this section. The persons who are placed, with respect to such amounts, *in the same position as the decedent are the decedent's estate*, which in the great majority of cases will be the one who receives such amounts, and, if the estate does not collect such amounts but distributes the right to receive such amounts to the heir, next of kin, legatee, or devisee, who inherited or was bequeathed or devised such right, such heir, next of kin, legatee, or devisee. * * *

“Since this section provides for the treatment of such amounts as income to the persons *placed in the same position as the decedent with respect to such amounts*, the provisions of section 113(a)(5) with respect to the basis of property do not apply to these amounts in their hands. Furthermore, section 126 only applies to the amount of items of gross income in respect of a decedent, and items which are excluded from gross income with respect to the decedent under section 22(b) or section 116 are not within the provisions of section 126.

* * * * *

“Subsection (a)(3) of section 125 provides that the right to receive an amount described in subsection (a)(1) shall be *treated in the hands of a person described in that subsection as if it had been acquired in the transaction by which the decedent acquired such right, and shall be considered as having the same character it would have had if the decedent had lived and had received such amount. This provision is designed to place the person described in subsection (a)(1) in the same position with respect to the nature of this income as the position the decedent enjoyed.* Thus, if the income to the decedent would have been capital gain from the sale of property, if he had lived and had received it, the income when received, or its fair market value if transferred, shall be treated in the hands of the person described in (a)(1) as capital gain from the sale of the property, in the same manner as if such person had held the property for the period the decedent held it, and had made the sale. Similarly, if the income is interest on United States obligations owned by the decedent, such income shall be treated for the purpose of determining the credit provided by section 25(a)(1) and (2) in the hands of the person receiving it as interest from United States obligations, as if such person owned the obligations with respect to which such interest is paid. If the amounts would have constituted earned income to the decedent, such amounts shall constitute earned income to the person including such amounts in his gross income to the same extent as if he had engaged in place of the decedent in the transaction in which the amounts were earned. If the amounts are compensation for personal services rendered over a period of 36 months, and would be within the provisions of section 107 if the

decedent lived and included such amounts in his gross income, section 107 applies. That is, the tax of the person including this amount in gross income attributable to the inclusion of such amount in his income shall not exceed the aggregate of the taxes of the decedent which would be attributable to such amount if it had been received by the decedent in equal portions in each of the months included in the period in which the personal services were rendered. * * *"
[Italics supplied.]

Nearly identical language is contained in S. Rep. No. 1631, *supra*, and similar provisions are included in the Commissioner's regulations, Treasury Regulations 111, Section 29.126-1 (quoted in the Brief for Respondent, pages 25-9).

Had the decedent himself lived to receive the \$80,517.00, he would not have been permitted the unlimited charitable deduction of Section 162(a), as that deduction is by its specific terms limited to trusts and estates. Under petitioners' theory, the unlimited charitable deduction would be permitted to the estate even though it would have been denied to decedent in his lifetime. This interpretation frustrates the clearly expressed Congressional intent regarding Section 126 and should therefore be rejected.

If any of the number of sections of the Internal Revenue Code expressed in general terms are literally applied to amounts treated as income under the specific provisions of Section 126 (as petitioners are attempting to apply Section 162(a)), without taking into account the basic purpose behind Section 126, results obviously unintended by Congress will ensue. For example, let us assume that certain amounts constituting gross income under Section 126 are

received by an estate, that such amounts were attributable to the personal services of a decedent and had he received such amounts they would have qualified for special treatment under Section 107 of the Code. Attempting to apply the wording of Section 107 literally to such a case, without taking into account the basic purpose of Section 126, would result in the denial of the benefits of Section 107 to such amounts, since Section 107 applies only to amounts "received or accrued * * * by an individual or a partnership," and the estate is not an individual or a partnership. Likewise, it might be argued that interest on certain United States obligations received by an estate and constituting gross income under Section 126 could not qualify for the normal tax credit provided by Section 25(a) of the Code since such interest is not included in gross income under Section 22 of the Code (a prerequisite to the credit under Section 25) but is included in gross income under Section 126 of the Code. Yet the Committee Report quoted above clearly shows that in both of these cases the estate or other person receiving the income to which Section 126 applies is entitled to the same benefits and is to be treated in the same manner as if the amounts in question had been received by the decedent himself rather than by the estate or heir.

The examples given in the reports quoted above are obviously not intended to be exclusive; they are merely general examples of the basic premise that Section 126 "is designed to place the person described in subsection (a)(1) in the same position with respect to the nature of this income as the position the decedent enjoyed." Petitioners seek to place the estate in a more favorable position than

that which would have been enjoyed by the decedent in that it would afford to the estate benefits of Section 162(a) for which the decedent could not have qualified.

The petitioners' contention that Section 162(a) applies to amounts considered as gross income under Section 126 should be rejected for the additional reason that its adoption would permit a double deduction to decedents (such as the instant decedent) reporting on the cash basis and would discriminate against the estates and heirs of decedents who had reported their income on the accrual basis. Under petitioners' theory, the estate in the instant case would include in its gross income for the taxable year 1945 the amount of \$80,517.00. The estate would be allowed a deduction under Section 126(c) of the \$36,514.30 in estate taxes attributable to the inclusion of this item in the Federal estate tax return (R. 31-2), and in addition would be allowed a deduction under Section 162(a) of the Code of the entire amount of \$80,517.00 paid over to the University. Thus, the estate would be allowed deductions aggregating \$117,031.30 because of including an item of income of \$80,517.00. This deduction would, of course, not only completely offset the income included under Section 126 but would also offset a great deal of the regular income of the estate. Before enactment of Section 126, the estate would not have included the \$80,517.00 in its income; however, it would have been entitled neither to the \$80,517.00 deduction claimed under Section 162(a) nor to the deduction of \$36,514.30 allowed under Section 126(c). Thus, under the construction urged by petitioners, the net effect of Section 126 in the instant case would be to increase the gross income of the estate by \$80,517.00 and to increase its

deductions by \$117,031.30. Section 126, which was intended by Congress to tax to estates and heirs, income in respect of decedents which otherwise would have escaped taxation, would, under petitioners' theory, *reduce* the taxable income of the estate by the amount of \$36,514.30! Certainly this bizarre result was not intended by Congress.

The fact that under petitioners' theory there would be double deductions is, of itself, sufficient to warrant its rejection. Double deductions are not permitted under the income tax laws. Treasury Regulations 111, Section 29.23(a)-1 states:

“* * * Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * *”

The same provisions occur in Regulations 111, Section 29.23(a)-15(c).

To appreciate more fully the consequences of the adoption of petitioners' argument, we should consider what would have happened had the decedent in the instant case reported his income on the accrual basis. In that event, he would have reported this amount of \$80,517.00 in his income for a year or years prior to his death and would have paid income taxes thereon, without the benefits of Section 162(a). At his death, the amount of \$80,517.00 (offset in part by the income taxes payable thereon) would have been includible in the decedent's estate for Federal estate tax purposes. When the \$80,517.00 was actually paid to and received by the estate, it would not constitute income to the estate under Section 126 at all, nor would there be any deduction under Section 126(c). There would be no deduction under

Section 162(a) in case of a distribution to a charity, since the amount in question would constitute gross income of the estate neither under Section 126 nor otherwise. Thus, under petitioners' theory, had the decedent in the instant case reported his income on the accrual basis, he would have included in his income during his lifetime the amount of \$80,517.00 and paid income taxes thereon. However, by being on the cash basis, he escapes paying income tax on this amount during his lifetime and his estate is not only freed from any income tax liability with respect to this amount but actually is enabled to reduce its taxable income by \$36,514.30 by reason of Section 126.

Petitioners thus interpret Section 126 not as subjecting to income tax income which would otherwise have escaped taxation, but as granting to such income a double deduction. They interpret that section not as removing the discrimination against accrual basis taxpayers and in favor of cash basis taxpayers, but rather as increasing this discrimination. The construction of that section by the Tax Court in this case, on the other hand, carries out the express intent of Congress that income of the type involved here be taxed to the estate or to the other person receiving it and effectively removes the discrimination between cash basis and accrual basis taxpayers which was present under the old law.

Petitioners place their main reliance upon *Boston Safe Deposit & Trust Co. v. United States* (D.C. Mass., 1948) 75 F. Supp. 884 (Appellants' Opening Brief, page 12 and Appendix). However, that case is clearly not in point. The *Boston Safe Deposit* case involved income *earned by the estate* after decedent's death rather than income earned

by the decedent and treated as income to the estate solely by reason of Section 126 of the Code.

In that case, the decedent had been a member of a partnership during his lifetime and after his death, his executors under an arrangement with the other partners became a partner and received certain portions of the partnership earnings. The executors distributed these earnings to the trustees of a trust created under decedent's will under an order of the probate court which referred to them as principal and not as income. It was held that the amounts thus paid constituted income of the estate and that the estate was entitled to a deduction under Section 162 of the amounts distributed to the trustees.

The *Boston Safe Deposit* case merely holds that a deduction under Section 162 is allowable for distributions of income *earned by the estate* after the decedent's death; it is not authority for the double deduction claimed by the petitioners in the instant case and is not authority for the discrimination against accrual basis taxpayers that would result from adoption of petitioners' construction of Section 162.

Dated: April 29, 1952

Respectfully submitted,

SAMUEL TAYLOR,
WALTER G. SCHWARTZ,
Amici Curiae

TAYLOR & SCHWARTZ,
Of Counsel

No. 13009

United States
Court of Appeals
For the Ninth Circuit.

GEORGE GARDNER, as Trustee in Bankruptcy
for the Estate of Ruth Vena Johnson, Also
Known as Ruth Boyce, Bankrupt,

Appellant,

vs.

RUTH VENA JOHNSON, Also Known as Ruth
Boyce,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

No. 13009

United States
Court of Appeals
For the Ninth Circuit.

GEORGE GARDNER, as Trustee in Bankruptcy
for the Estate of Ruth Vena Johnson, Also
Known as Ruth Boyce, Bankrupt,

Appellant,

vs.

RUTH VENA JOHNSON, Also Known as Ruth
Boyce,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

THOMAS S. TOBIN,
817, 111 West 7th St.,
Los Angeles 14, Calif.

For Appellee:

JOSEPH MAYER,
450 N. Beverly Dr.,
Beverly Hills, Calif.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 44916-Y

In the Matter of
RUTH VENA JOHNSON, sometimes known as
RUTH BOYCE,

Bankrupt.

DEBTOR'S PETITION

Form No. 1

To the Honorable Judge of the District Court of
the United States for the Southern District
of California.

The Petition of Ruth Vena Johnson, sometimes known as Ruth Boyce, Residing at No. 701 Grammercy Drive, in Los Angeles, County of Los Angeles, State of California, by occupation a Realtor, and employed by Self, respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at above address within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Sched-

ule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

/s/ RUTH VENA JOHNSON
BOYCE,
Petitioner.

/s/ MILTON M. COHEN,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

I, Ruth Vena Johnson, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ RUTH VENA JOHNSON
BOYCE,
Petitioner.

Subscribed and sworn to before me this 23rd day of April, 1947.

[Seal] /s/ MILTON M. COHEN,
Notary Public. [2*]

Schedule B

Statement of All Property of Bankrupt

Schedule B-1—Real Estate

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.	Estimated value of Debtor's Interest	
	Dollars	Cents
—Statement of particulars relating thereto.		

None.

/s/ RUTH VENA JOHNSON
BOYCE,
Petitioner. [27]

Schedule B-4

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's in-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

terest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

GENERAL INTEREST	PARTICULAR DESCRIPTION	Estimated Value of Interest
Interest in Land	None.	Dollars Cents
Personal Property	None.	
Property in Money, Stock, Shares, Bonds, Annuities, etc.,	None.	
Rights and Powers, Legacies and Be- quests	None.	

Property heretofore conveyed for
benefit of creditors

Portion of debtor's property conveyed by deed of assignment or other- wise, for the benefit of creditors; date of such deed, name and ad- dress of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor.	Amount realized as proceeds of property conveyed
---	---

Attorneys Fees.

None.

Sum or sums paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.

None.

/s/ RUTH VENA JOHNSON
BOYCE,
Petitioner. [32]

Schedule B-5

Property claimed as exempt from the operation of the act of Congress relating to bankruptcy.

(N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.	Valuation	
	Dollars	Cents

None.

Property claimed to be exempt by State laws, with reference to the statute creating the exemption.

None.

/s/ RUTH VENA JOHNSON
BOYCE,
Petitioner. [33]

Schedule B-6

Books, Papers, Deeds and Writing relating to Debtor's Business and Estate

The following is a true list of all books, papers,

deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody, or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books

Dollars Cents

None.

Deeds

None.

Papers

None.

/s/ RUTH VENA JOHNSON
BOYCE,
Petitioner.

Oath to Schedule B

State of California,

County of Los Angeles—ss.

I, Ruth Vena Johnson, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with

the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ RUTH VENA JOHNSON
BOYCE,
Petitioner.

Subscribed and sworn to before me this 23rd day of April, 1947.

[Seal] /s/ MILTON M. COHEN, JR.,
Notary Public.

[Endorsed]: Filed April 24, 1947. [34]

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND
OF GENERAL REFERENCE

At Los Angeles, in said District, on April 24, 1947.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings

be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings herein-after mentioned, to take such further proceedings therein as are required and permitted by said Act and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 44,916-Y.

Title of Proceedings: RUTH VENA
JOHNSON, aka RUTH BOYCE.

Filed: 4/24/47.

Referee: Benno M. Brink, Esq.,
Los Angeles, Calif.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed April 24, 1947. [35]

[Title of District Court and Cause.]

No. 44,916-Y

BOND OF TRUSTEE

Know All Men By These Presents: That we George Gardner, of Los Angeles, California, as principal, and J. C. Keenan, of Los Angeles, California, and James A. A. Smith, of Los Angeles,

California, as sureties, are held and firmly bound unto the United States of America in the sum of One Hundred & no/100 (\$100.00) Dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and Sealed this 12th day of May, A.D. 1947.

The Condition of this obligation is such, that whereas the above-named George Gardner, was, on the 12th day of May, A.D. 1947, appointed trustee in the case pending in bankruptcy in said court, wherein Ruth Vena Johnson, also known as Ruth Boyce, is the bankrupt, and he, the said George Gardner, has accepted said trust with all the duties and obligations pertaining thereto:

Now, Therefore, if the said George Gardner, trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then

this obligation to be void; otherwise to remain in full force and virtue.

Signed and Sealed in presence of:

[Seal] /s/ GEORGE GARDNER.

[Seal] /s/ J. C. KEENAN.

[Seal] /s/ JAMES A. A. SMITH.

We, the sureties in the above bond, on oath depose and say, that we have property in our own name, above liabilities and exemptions, to exceed the amount of this bond.

Examined and recommended for Approval as provided in Rule 13.

/s/ J. C. KEENAN,

/s/ JAMES A. A. SMITH.

Subscribed and Sworn to before me this 13th day of May, A.D. 1947.

[Seal] /s/ E. B. BOWMAN,

Notary Public.

I do hereby certify that I have made personal investigation of the financial resources of the sureties and that I am satisfied that the within bond is sufficient and proper for the purposes for which it is given.

Date: May 12th, 1947.

/s/ GEORGE GARDNER.

Approved this 13th day of May, 1947.

/s/ BENNO M. BRINK,

Referee.

[Endorsed]: Filed May 13, 1947. [36]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

REFEREE'S CERTIFICATE ON PETITIONS
FOR REVIEW OF ORDER QUIETING
TITLE TO REAL PROPERTY

To the Honorable Leon R. Yankwich, Judge of the
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of the said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

On February 14, 1951, your Referee made his order [37] in this matter in which he decreed that George Gardner, the trustee in bankruptcy herein, was the owner of certain real property, in said order described, free and clear of any right, title, interest, lien or claim against the same, asserted by any of the respondents named in the said order, save and except a lien in the sum of \$67.00 held by the Bank of America National Trust and Savings Association.

Ruth Vena Johnson, aka Ruth Boyce, the bankrupt herein, and Harry V. Mooney, a creditor in this matter, two of the aforesaid respondents, have duly filed herein their separate petitions for the review of the said order.

The Proceedings

On April 24, 1947, the said bankrupt filed in this

matter her voluntary petition in bankruptcy and an order of adjudication was made thereon on the same day.

On November 9, 1950, the aforesaid trustee in bankruptcy filed herein his petition for an order to show cause to quiet title to the real property hereinbefore mentioned. On the same day an order to show cause was issued on the said petition and the same was set for hearing on December 14, 1950.

On November 28, 1950, the aforesaid Harry V. Mooney filed his answer to the said petition and order to show cause, in which he alleged that he held a lien upon the property here involved pursuant to an abstract of a judgment which he had caused to be recorded on October 17, 1945. The trustee herein, through his counsel, conceded that the said abstract of judgment had been so recorded, but he asserted that the lien of the said judgment had expired on October 18, 1950.

On December 11, 1950, the bankrupt filed in this [38] matter an instrument captioned "Claim to Homestead Exemption: In Real Property, Under Section #1260 and Section #1261 B.-C of the Civil Code Statute of the California Law," in which she alleged, among other things, that she was "entitled to her homestead exemption filed on November 18, 1944," on the property here in question. On January 6, 1951, the bankrupt filed a further instrument captioned "Homestead Exemption, Claim," in which she asserted a homestead exemption claim on the property here involved, under the aforesaid homestead declaration filed on No-

vember 18, 1944. In her bankruptcy schedules which the bankrupt filed in this matter on April 24, 1947, she did not schedule the property here involved, as an asset, nor did she claim the same as exempt under her declaration of homestead. Counsel for the trustee admitted that the bankrupt had recorded the declaration of homestead upon the property here in question, prior to the commencement of this bankruptcy proceeding, but he asserted that her claim of homestead was no longer of any force or effect by reason of the fact that she had failed to claim the said property as exempt as a homestead in this proceeding, and by reason of the further fact that prior to this bankruptcy proceeding she had made a fraudulent conveyance of the said property, which conveyance was set aside in an action instituted by the trustee in bankruptcy herein, against the bankrupt and others, and in which action the alleged homestead rights of the bankrupt were neither pleaded nor claimed by the bankrupt or by any other party in interest in the action.

The aforesaid petition filed by the trustee in bankruptcy herein on November 9, 1950, and the order to show cause issued thereon, were on your Referee's calendar [39] on December 14, 1950, January 25, 1951, and February 6, 1951. Thereafter, on February 14, 1951, your Referee signed and filed his Order Quieting Title to Real Property in this matter, in which he ruled in favor of the trustee and against the aforesaid petitioners on review on their respective contentions in this case. It is

from the said order that the reviews herein certified are taken.

The Questions Presented

The sole question presented by the petition for review filed herein by the said Harry V. Mooney is this:

Did the judgment lien held by the said Harry V. Mooney, on the property here in question, expire on October 18, 1950?

The only question presented by the petition for review filed herein by the bankrupt in this matter is the following:

Does the bankrupt have a right of homestead in and to the property here involved, which is valid and enforceable against the trustee in bankruptcy in this proceeding?

The Evidence

The facts relating to the question presented by the petition for review filed herein by the said Harry V. Mooney are as follows:

The said Harry V. Mooney caused an abstract of his judgment against the bankrupt to be recorded on October 17, 1945.

This bankruptcy proceeding began on April 24, 1947.

On November 17, 1948, your Referee made an order denying the bankrupt a discharge in this proceeding. [40] On January 27, 1949, the bankrupt filed herein an "appeal" for the review of the said order denying discharge. On

September 13, 1949, your Referee filed with the Clerk of the Court his certificate on the review of the said order denying discharge. The matter of the said review is still pending.

The time for filing claims expired in this case on November 12, 1947. On November 10, 1947, the said Harry V. Mooney filed his claim in this matter for \$10,871.64 plus interest, based upon a judgment recovered by him against the bankrupt herein. (The said claim is now on file as Plaintiff's Exhibit No. 5 in Civil Proceeding No. 7723-WM in this Court, in which proceeding George Gardner, etc., is plaintiff and Gladys Venes and others are defendants. There appears to be no reference in the said claim to any security held by the claimant).

The facts relating to the question presented by the petition for review filed herein by the bankrupt are as follows:

Prior to the commencement of this bankruptcy proceeding, the bankrupt recorded her declaration of homestead upon the real property here involved.

On October 28, 1947, the trustee in bankruptcy herein filed a complaint against the bankrupt and others, with respect to the real property here involved, in Civil Proceeding No. 7723-WM in the United States District Court for the Southern District of California. The title of the said proceeding is "George Gardner, etc., Plaintiff, v. Gladys Venes, et al., Defend-

ants." The bankrupt appeared in the said action, but her homestead rights in or to the said [41] property were neither pleaded nor claimed by her or by any other party in the proceeding.

On February 10, 1949, a judgment was entered in the said proceeding, in which it was decreed that certain transfers made of the said property by the bankrupt, on December 2, 1944, and December 14, 1944, were fraudulent and void and that the trustee in bankruptcy herein was the owner of the said property. The said judgment was affirmed on an appeal taken therefrom by the bankrupt and it is now final.

REFEREE'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Your Referee's findings of fact and conclusions of law in this matter are incorporated in your Referee's Order Quieting Title to Real Property, the original of which is going up with this certificate.

Papers Submitted

The following papers are herewith transmitted:

- (1) Petition for Order to Show Cause Quieting Title to Real Property, filed November 9, 1950.
- (2) Order to Show Cause, filed November 9, 1950.
- (3) Order Authorizing Service of Process by Private Citizen, filed November 17, 1950.

(4) Answer to Order to Show Cause, filed by Harry V. Mooney on Nov. 28, 1950.

(5) Affidavit of Service on Walter G. Johnson and Ruth Vena Johnson, filed Dec. 7, 1950.

(6) Application for Extension of Time, etc., filed Dec. 9, 1950.

(7) Claim to Homestead Exemption, etc., filed Dec. 11, 1950.

(8) Order Continuing Hearing, etc., filed Dec. 14, 1950.

(9) Homestead Exemption Claim, filed Jan. 6, 1951. [42]

(10) Order Quieting Title to Real Property, filed Feb. 14, 1951.

(11) Petition for Order Extending Time, etc., filed Feb. 23, 1951.

(12) Order Extending Time, etc., filed Feb. 23, 1951.

(13) Order Extending Time, filed Feb. 24, 1951.

(14) Petition for Review, filed by Harry V. Mooney on March 20, 1951.

(15) Petition for Review by Ruth Vena Johnson, etc., filed March 22, 1951.

The following instruments, now on file in Civil Proceeding No. 7723-WM, in the Office of the Clerk of the United States District Court for the Southern District of California, were received in

evidence by reference as Trustee's Exhibits Nos. 1 to 9, in the following order, to wit:

Trustee's Exhibits:

- (1) Complaint filed Oct. 28, 1947.
- (2) Answer of Defendants Gladys Venes and Ruth Vena Johnson, filed Dec. 29, 1947.
- (3) Stipulation dated Jan. 16, 1948, filed Jan. 17, 1947.
- (4) Order Approving Stipulation and Appointing Guardian ad litem, dated Jan. 16, 1948. Filed Jan. 17, 1947.
- (5) Amended Complaint, filed Jan. 21, 1948.
- (6) Answer of Defendants, filed Feb. 10, 1948.
- (7) Findings of Fact and Conclusions of Law, filed Feb. 10, 1949.
- (8) Judgment, filed Feb. 10, 1949.
- (9) Mandate, filed Apr. 19, 1950.

The aforesaid proceeding No. 7723-WM is entitled "George Gardner, etc., Plaintiff, v. Gladys Venes, et al., Defendants."

Respectfully submitted this 5th day of April, 1951.

/s/ BENNO M. BRINK,
Referee in Bankruptcy. [43]

[Endorsed]: Filed April 5, 1951. U.S.D.C.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

PETITION FOR ORDER TO SHOW CAUSE
QUIETING TITLE TO REAL PROPERTY

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Comes now your petitioner, George Gardner, and
respectfully shows the Referee:

I.

That he is the duly appointed, qualified and acting
Trustee in bankruptcy herein.

II.

That on or about December 2, 1944, the bankrupt, Ruth Vena Johnson, also known as Ruth Boyce, made a fraudulent conveyance of certain real property situated in the City of Los Angeles, County of Los Angeles and State of California, and described as:

Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the office of [44] the County Recorder of said County,

to her daughter, Gladys Venes, and her daughter's children, as their separate property, which deed was recorded in Book 21,600, Page 211, of Official Records.

III.

That said real property was not scheduled in the bankrupt's schedules, nor was any attempt made to claim the same as exempt, and the existence of the same and of the bankrupt's transfer of the same was concealed from your petitioner as Trustee in bankruptcy until he and his counsel, Thomas S. Tobin, through independent investigation learned of said transfer.

IV.

That thereafter, on October 28, 1947, your petitioner instituted an action in the United States District Court for the Southern District of California, Central Division, being Action No. 7723 Civil, against the bankrupt, her daughter, Gladys Venes, and the minor children of the said Gladys Venes; that counsel were engaged by the said Ruth Vena Johnson to represent all of the defendants; that a stipulation was entered into between counsel for the Trustee and Rupert B. Turnbull, Esq., the then attorney for the defendants, consenting to an order being made by Honorable Leon B. Yankwich, United States District Judge, appointing Gladys Venes as guardian ad litem for the minor children; that an answer was duly filed on behalf of all defendants in said action, the matter tried, and on February 10, 1949, the decree was entered by Honorable William C. Mathes, United States District Judge, before whom said action was tried, decreeing said transfer to be fraudulent and void as to creditors of the bankrupt herein, and as to

her Trustee, and setting the same aside; that thereafter, an appeal was taken by the defendants to the United States Court of Appeals for the Ninth Circuit, and the District Court's judgment was affirmed, and thereafter a petition for writ of certiorari was filed in the [45] United States Supreme Court by said defendants and was denied and said decree has long since become final.

V.

That your petitioner is in actual and constructive possession of said real property, having taken over the same immediately after the entry of the judgment of the District Court on February 10, 1949, and that your petitioner is renting said real property to a tenant on a month to month basis and collecting the rents each month for the benefit of this bankrupt estate.

VI.

That a search of the title by the Title Insurance and Trust Company reveals numerous clouds on the title to said real property due to the bankrupt's frantic attempts to conceal the same and to defraud her creditors, also due to numerous judgments against the bankrupt obtained by various creditors, abstracts of which have been filed for record.

VII.

That before your petitioner can sell said property and give a clear title thereto, it will be necessary that title be quieted against the holders of various

purported conveyances and various purported liens of record against said real property, all of which are inferior to the right, title and interest of the Trustees herein, in and to said real property.

VIII.

That the following persons, firms, copartnerships or corporations claim some right, title, interest, lien or claim in and to the real property hereinbefore described, but that all of said rights, titles, interests, liens, or claims are inferior to the right, title and interest of your petitioner as Trustee in bankruptcy, and that your petitioner, as such Trustee in bankruptcy, is vested with title to said real property as of the date of the filing of the petition, as property transferred by the bankrupt in [46] fraud of her creditors, and property which prior to the filing of the petition she could by any means have transferred or which might and is now vested with the fee ownership to said real property; have been levied upon or sold under judicial process against her, that said real property constitutes property recovered by your petitioner as Trustee in bankruptcy in which the said Ruth Vena Johnson, also known as Ruth Boyce, could not claim an exemption under Section 6 of the National Bankruptcy Act, and that said bankrupt had no time during these proceedings asserted a claim of exemption to said real property:

1. Ruth Vena Johnson.
2. Vena Ruth Johnson,

also known as Ven Ruth Johnson
also known as Vera Ruth Johnson
also known as Ruth V. Johnson
also known as Ruth Johnson
also known as Vena Johnson
also known as Verna Ruth Johnson
also known as Ruth Boyce
also known as Ruth Boyce, doing business
as Boyce Realty Co.
also known as Ruth V. Boyce
also known as Mrs. Ruth Boyce
also known as Vena Crooke
also known as Louise Crooks
also known as Louise Crooks, doing business
as Hollywood Real Estate School
also known as Ruth Rosen
also known as Ruth Venas
also known as Gladys Venes
also known as Gladys Goldman
also known as Mrs. Ralph Gordon

(The foregoing are aliases under which the bankrupt [47] operated).

3. Boyce Realty Company, a corporation.
Boyce Realty Co., a fictitious firm name and style used by Ruth Vena Johnson, also known as Ruth Boyce.
Boyce Realty Co., a copartnership consisting of Ruth Vena Johnson, and an unknown partner or partners.
Hollywood Real Estate School, owned and operated by the bankrupt as Louise Crooks.

4. Johnson Realty Company.
5. Walter Johnson, also known as Walter G. Johnson, also known as Walter George Johnson.
6. Gladys Venes and John Doe Venes, her husband, whose true name is unknown to the Trustee.
7. Frank Venes, Jr., a minor.
8. Ruth Venes, a minor.
9. Mary Jane Venes, a minor.
10. Judith Venes, a minor.
11. John Doe Venes, a minor.
12. Jane Doe Venes, a minor.

(The last two named as Does because the Trustee is informed that another child has been born to Gladys Venes of Scotch Plains, New Jersey, since the institution of the proceeding to set aside the bankrupt's fraudulent transfer).

13. Harry V. Mooney and Jane Doe Mooney, his wife, whose true name is unknown to the Trustee.
14. Retailers Credit Association of San Francisco.
15. The Assignor of the claim on which the judgment of the Retailers Credit Association of San Francisco was based. [48]
16. Bank of America National Trust and Savings Association, a national banking association.

17. Royal Howard and Royal Howard, doing business as Research Clearing House.
18. Robert Rowe.
19. Department of Employment of the State of California.
20. State of California.
21. Union Bank & Trust Company of Los Angeles, a corporation.
22. Roy P. Schoettler and Roy P. Schoettler, doing business as Pacific Coast Claim Adjusters.
23. Jane Doe Schoettler, wife of Roy P. Schoettler, true name unknown.
24. M. F. Bowler, Jr., Trustee under deed of trust in favor of Farmers and Merchants National Bank of Los Angeles.
25. The Farmers and Merchants National Bank of Los Angeles, a corporation.
26. Charles E. Gillstrom and Jane Doe Gillstrom, his wife, whose true name is to the Trustee unknown.
21. H. Morrow, and Jane Doe Morrow, his wife, whose true name is to the Trustee unknown.
22. Title Insurance and Trust Company, a corporation, as Trustee under deed of trust in favor of Lee Combs and Wallace B. Scales.
23. Lee Combs and Jane Doe Combs, his wife, whose name is to the Trustee unknown.
24. Wallace B. Scales and Jane Doe Scales,

his wife, whose true name is to the Trustee unknown.

25. City of Los Angeles, a municipal corporation.
26. Department of Water and Power of the City of Los Angeles. [49]
27. The United States of America, claimant of tax lien.

IX.

That your petitioner is informed that the bankrupt recorded a declaration of homestead on said real property on November 18, 1944, before she transferred said real property to her daughter, Gladys Venes and her children, which declaration of homestead was recorded in Book 21478, Page 52, Official Records, and that thereafter on January 29, 1946, there was recorded a declaration of homestead in favor of Gladys Venes, married, dated January 29, 1946, in Book 22,775, at Page 152, at which time Gladys Venes was not a resident of the State of California, but was a resident of Scotch Plains, New Jersey; that both of said homestead declarations are null and void and of no force and effect, that of the bankrupt being nullified by her alienation of the property, and that of Gladys Venes being fraudulent for the reason that the said Gladys Venes was not living on said property at the time of the filing of said declaration of homestead.

Wherefore, the Trustee prays that an order issue decreeing that none of the persons, firms, copartnerships, associations or corporations hereinbefore

named have any right, title, interest, lien or claim in and to said real property superior to that of your petitioner as Trustee in bankruptcy; that this Court enter an order appointing a guardian ad litem for the minor defendants, Frank Venes, Jr., Ruth Venes, Mary Jane Venes, Judith Venes, John Doe Venes and Jane Doe Venes, to represent them in this matter; that the Trustee be decreed to have a clear title to said real property; that the attempted declarations of homestead on said real property by the bankrupt, Ruth Vena Johnson, and her daughter, Gladys Venes, be decreed to be void as against the Trustee herein, and that the Trustee be given such other and further relief as the Court may deem just and equitable in the premises.

/s/ GEORGE GARDNER,
Trustee in Bankruptcy.

/s/ THOMAS S. TOBIN,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed November 9, 1950. [50] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

ORDER TO SHOW CAUSE

Upon reading and filing the verified petition of George Gardner, the Trustee in Bankruptcy herein,

and it appearing to the Referee from said petition that the Trustee is in possession of certain real property therein described, with numerous clouds on the title as described in said petition, which must of necessity be cleared or disposed of before the Trustee can sell said real property, now on motion of Thomas S. Tobin, attorney for the Trustee, it is

Ordered that the following persons, firms, corporations, copartnerships, associations and other respondents named in the Trustee's petition, as follows:

Ruth Vena Johnson

Vena Ruth Johnson

also known as Ven Ruth Johnson

also known as Vera Ruth Johnson

also known as Ruth V. Johnson [52]

also known as Ruth Johnson

also known as Vena Johnson

also known as Verna Ruth Johnson

also known as Ruth Boyce

also known as Ruth Boyce, doing business as
Boyce Realty Co.

also known as Mrs. Ruth Boyce

also known as Vena Crooke

also known as Louise Crooks

also known as Louise Crooks, doing business as
Hollywood Real Estate School

also known as Ruth Rosen

also known as Ruth Venas

also known as Gladys Venes

also known as Gladys Goldman

also known as Mrs. Ralph Gordon.

(The foregoing are aliases under which the bankrupt operated.)

Boyce Realty Company, a corporation.

Boyce Realty Co., a fictitious firm name and style used by Ruth Vena Johnson, also known as Ruth Boyce.

Boyce Realty Co., a copartnership consisting of Ruth Vena Johnson, an unknown partner or partners.

Hollywood Real Estate School, owned and operated by the bankrupt as Louise Crooks.

Johnson Realty Company.

Walter Johnson, also known as Walter G. Johnson, also known as Walter George Johnson.

Gladys Venes and John Doe Venes, her husband, whose true name is unknown to the Trustee.

Frank Venes, Jr., a minor. [53]

Ruth Venes, a minor.

Mary Jane Venes, a minor.

Judith Venes, a minor.

John Doe Venes, a minor.

Jane Doe Venes, a minor.

(The last two named as Does because the Trustee is informed that another child has been born to Gladys Venes of Scotch Plains, New Jersey, since the institution of the proceeding to set aside the bankrupt's fraudulent transfer.)

Harry V. Mooney and Jane Doe Mooney, his wife, whose true name is unknown to the Trustee.

Retailers Credit Association of San Francisco.
The Assignor of the claim on which the judgment of the Retailers Credit Association of San Francisco was based.

Bank of America National Trust and Savings Association, a national banking association.

Royal Howard and Royal Howard, doing business as Research Clearing House.

Robert Rowe.

Department of Employment of the State of California.

State of California.

Union Bank & Trust Company of Los Angeles, a corporation.

Roy P. Schoettler and Roy P. Schoettler, doing business as Pacific Coast Claim Adjusters.

Jane Doe Schoettler, wife of Roy P. Schoettler, true name unknown.

M. F. Bowler, Jr., Trustee under deed of trust in favor of Farmers and Merchants National Bank of Los Angeles.

The Farmers and Merchants National Bank of Los Angeles, a corporation. [54]

The United States of America, claimant of tax lien.

Charles E. Gillstrom and Jane Doe Gillstrom, his wife, whose true name is to the Trustee unknown.

H. Morrow and Jane Doe Morrow, his wife,
whose true name is to the Trustee unknown.

Title Insurance and Trust Company, a corporation,
as Trustee under deed of trust in favor
of Lee Combs and Wallace B. Scales.

Lee Combs and Jane Doe Combs, his wife,
whose name is to the Trustee unknown.

Wallace B. Scales and Jane Doe Scales, his
wife, whose true name is to the Trustee unknown.

City of Los Angeles, a municipal corporation.
Department of Water and Power of the City
of Los Angeles,

appear and show cause before the undersigned
Referee in bankruptcy at his courtroom in the
Federal Building, Los Angeles, California, on the
14th day of December, 1950, at the hour of 10:00
o'clock in the forenoon on said date, and then and
there establish any right, title, interest, lien or claim
in their favor to real property situated within the
County of Los Angeles and State of California,
described as:

Lot 4 in Block 29 of Tract No. 7555, in the
City of Los Angeles, County of Los Angeles
and State of California, as per map recorded
in Book 88, Pages 79 to 84, inclusive, of Maps,
in the office of the County Recorder of said
County,

and show cause why the Trustee should not be
decreed to be the owner of said real property free
and clear of any right, title, interest, lien, claim,

or homestead right therein, and why the Trustee should not be authorized to sell said real property for the benefit of the bankrupt estate.

It Is Further Ordered, that any of the respondents seeking [55] recognition of any right, title, interest, lien or claim in their favor against said real property, file their answer in writing with this Court, asserting their right, title, interest, lien or claim thereto at least five (5) days prior to the date of hearing thereon.

It Is Further Ordered that personal service be made on the minor respondents, Frank Venes, Jr.; Ruth Venes, Mary Jane Venes, Judith Venes, John Doe Venes and Jane Doe Venes in the State of New Jersey, or wherever they may be residing, and that personal service be made if possible on the bankrupt, Ruth Vena Johnson, also known as Ruth Boyce, and Walter Johnson, also known as Walter G. Johnson, also known as Walter George Johnson, and that otherwise services may be made on respondents herein by mail.

Done at Los Angeles, in the Southern District of California, this 9th day of November, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Received November 9, 1950.

[Endorsed]: Filed November 9, 1950. [56] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

ORDER AUTHORIZING SERVICE OF
PROCESS BY PRIVATE CITIZEN

On motion of Thomas S. Tobin, attorney for the Trustee, it is

Ordered that R. J. Phelan of Los Angeles, California, or any other citizen of the United States over the age of twenty-one years, may serve the foregoing petition for order to show cause quieting title to real property and the order to show cause upon the persons named therein, who should be personally served, with the same force and effect as though said process were served by the United States Marshal for the Southern District of California.

Done at Los Angeles, in the Southern District of California, this 17th day of November, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed November 17, 1950. [57] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

AFFIDAVIT OF SERVICE ON WALTER G.
JOHNSON AND RUTH VENA JOHNSON

State of California,
County of Los Angeles—ss.

R. J. Phelan, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States and of the State of California, and over twenty-one years of age; that pursuant to the order entered herein by Honorable Benno M. Brink, Referee in Bankruptcy, your affiant did, on November 24, 1950, at Beverly Hills, in the County of Los Angeles, and the Southern District of California, serve two copies of the petition for order to show cause quieting title to real property, and the order to show cause issued thereunder, on Walter G. Johnson, one copy for the Johnson Realty Co. and the other for Walter Johnson, also known as Walter G. Johnson, also known as Walter George Johnson.

Your affiant further deposes and says that on the 25th day of November, 1950, at the California Institute for Women at [61] Tehachapi, in Kern County, in the Southern District of California, your affiant served five copies of said petition for order to show cause quieting title to real property and the order to show cause issued thereunder, on Ruth Vena Johnson, also known as Vena Ruth Johnson, for herself, and one copy each for the Boyce Realty Co., a corporation, of which she is an officer; one copy for the Boyce Realty Co., a fictitious firm name and style used by Ruth Vena Johnson, also known as Ruth Boyce; one copy for the Boyce Realty Co., a copartnership consisting of Ruth Vena Johnson and an unknown partner or partners, and one copy for the Hollywood Real Estate School, owned and operated by the bankrupt as Louise Crooks.

That your affiant delivered the copies of said

petition and order to each of the persons so served personally, and knows them and each of them to be the persons designated to be so served.

/s/ R. J. PHELAN.

Subscribed and Sworn to before me this 7th day of December, 1950.

[Seal] /s/ C. W. ROBINSON,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires April 16, 1952.

[Endorsed]: Filed December 7, 1950. [62] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

APPLICATION FOR AN EXTENSION OF
TIME TO FILE AN ANSWER IN THE PE-
TITION FOR ORDER TO SHOW CAUSE
QUIETING TITLE TO REAL PROPERTY,
UNDER ART. I, PART II, ADM. IV, V,
VI, VIII OF THE CONSTITUTION OF
THE UNITED STATES, CIVIL RIGHTS
STATUTE

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Now Comes This Bankrupt, Ruth Vena Boyce,
in Her Behalf and the Behalf of the Said Daughter,

Gladys Venes, and Her Children, Under a Power-of-Attorney That Is Duly Given to This Bankrupt to Act for and in Behalf of the Said Daughter and Her Children. This Bankrupt Comes This Day Applying and Making, Asking for an Extension of Time to File an Answer This Said Order to Show Cause on the Following Grounds as Heretofore Set Forth:

I.

That this Bankrupt is in custody of the State Prison at Tehachapi, California, the women's institution for women, and this Bankrupt was not duly notified of the said action until she was taken from the County of Los Angeles, which does hereby deprive her of the necessary time to secure counsel to defend this action. And this Court was duly in knowledge of the facts that exist as they are today and did sit and wait until this Bankrupt was taken from the City and County of Los Angeles, to defend herself and the owners involved in this matter, which this comes under the Civil Rights Statute of the Constitution of the United States. Then two days later, after she was taken from any source of help, the said Court and [63] the said counsel for the Trustee did send an officer to deliver to this said Bankrupt a notice of the said proceedings, knowing that this Bankrupt did not have her legal papers and documents to file an answer in the matter, which is taking the advantage of a person when you know that you have them where they cannot help themselves. This Bankrupt was delivered

to this institution on November 16th, 1950, which this said Court is well aware of, and she has certain procedures to go through before that she may or can have the papers and documents that she needs to defend herself, and, it becoming necessary for her to secure counsel, she prays to this Court for an extension for thirty days from this date, December 7th, 1950, to file the said answer. This Bankrupt is here without her files in the said matter, or papers, etc., and it therefore becomes necessary to have an extension of time to file the said answer.

II.

Whereupon, this Bankrupt prays to this Hon. Court, Benno M. Brink, for the said extension of time to answer the said Order to Show Cause, and the said time be extended until January 20th, 1951, to enable this Bankrupt to secure legal counsel to file the proper answer.

Witness my hand and seal this, the 7th, day of December, 1950.

/s/ RUTH BOYCE,

In Propria Persona.

[Endorsed]: Filed December 9, 1950. [64] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

CLAIM TO HOMESTEAD EXEMPTION: IN
REAL PROPERTY, UNDER SECTION
#1260 AND SECTION #1261-B-C OF THE
CIVIL CODE STATUTE OF THE CALI-
FORNIA LAW

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Comes now this Bankrupt, who does hereby file a Notice and Claim under the Statute of the California Law, Civil Code of Procedure, Section #1260 and Section #1261-B-C. That if this Court holds that this property, known and recorded as Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per Map recorded in Book 88, pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said County, being deeded to her daughter Gladys Venes and her children as their separate property being declared a fraudulent conveyance, which it was not. And this will be reopened in the U. S. District Court under the Civil Rights Statute if it is twenty years from this date, for this property has been taken illegally and unlawfully. Then if this Court holds that this Bankrupt is the legal owner of the said property, then she is entitled to her homestead exemption filed on November 18th, 1944, as the head of a family under Section #1261-B-C, and therefore files a Lien on

the said property for the Homestead exemption, under the said law, as there was a legal homestead filed and the said property was paid for cash. And this Bankrupt files and claims a homestead exemption to the amount of \$7,500.00 under the said law, Section #1261-B-C of the CCP. The said same Lien of Homestead being filed in the Los Angeles County Court House as of today. This Court having declared this conveyance to be a fraudulent conveyance, then it in reality becomes this Bankrupt's right under the law to her exemption of the homestead filed on November 18th, 1944, and a homestead comes ahead of any creditor, or creditors. And this Bankrupt holds that she objects to this quieting this title until this matter [65] has been settled in the courts. And the said homestead exemption has been declared under their false claim, and unlawfully taking of property that does not belong to this Court, and ask that this Court make no ruling in the quieting the title of this real property herein described until this Bankrupt has had her day in court, which every American citizen of the United States is given under the Constitution of the United States, Art. I, Part II, of the Constitution of the United States.

Whereupon, this Court has taken the advantage of this Bankrupt's position to settle this issue in waiting until she was sent out of the County of Los Angeles, to defend this action. Therefore, this is obstructing justice, and this Bankrupt demands an extension of time be granted to give her to secure legal counsel to defend this action:

Witnesseth: My hand and seal this 8th day of December, 1950, under my Civil Rights granted to me by the Board, December 5th, 1950.

/s/ RUTH BOYCE.

[Endorsed]: Filed December 11, 1950. [66] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

ORDER CONTINUING HEARING ON ORDER
TO SHOW CAUSE IN RE CERTAIN REAL
PROPERTY

Upon the application of Ruth Boyce, aka Ruth Vena Johnson, the above-named bankrupt, and good cause appearing therefor,

It is ordered that the hearing on the Order to Show Cause in re Certain Real Property, issued in the above-entitled matter on November 9, 1950, be and it hereby is continued from the 14th day of December, 1950, to the 25th day of January, 1951, at 10:00 a.m., in the courtroom of the undersigned Referee, 323 Federal Building, Temple and Spring Streets, Los Angeles, California.

Dated: December 14, 1950.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed December 14, 1950. [67] Referee.

[Title of District Court and Cause.]

HOMESTEAD EXEMPTION CLAIM

Now comes this Petitioner, Ruth Boyce, who under her civil rights granted to her on December 5th, 1950, she does hereby file under the law, Section #1260 and Section #1261-B-C, of the Civil Code of Procedure of the Statute of the California law, her legal claim to and her rights to the Homestead Exemption in that real property as follows: Situated in the City of Los Angeles, County of Los Angeles, State of California, and described as Lot 4 in Block 29 of Tract 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per Map recorded in Book 88, pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said County.

This said Homestead Exemption claim being claimed under a homestead filed in this said County and City in the records of the said County Recorder on November 18, 1944. This said Ruth Boyce, being then Ruth Johnson, when filed the said homestead on November 18, 1944. And the said Ruth Boyce, being the head of the family and the home, and this said property being paid cash for, she files and declares her Homestead Exemption under the laws of the Statute of the California law, in the amount of Seven Thousand and Five Hundred (\$7,500.00) Dollars, in and unto that real property, described as follows: Lot 4 in Block 29 of Tract 7555, in the City and County of Los Angeles, State of California, as per Map recorded in Book 88, pages 79 to

84, inclusive, in the office of the County Recorder of said County.

Witnesseth: My hand and seal this, the 8th, day of December, 1950.

/s/ RUTH BOYCE JOHNSON.

Homestead claim filed 1-4-51.

[Endorsed]: Filed January 6, 1951. [68] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

ORDER QUIETING TITLE TO
REAL PROPERTY

George Gardner, Trustee in Bankruptcy, having filed his petition with the Referee for an order against various persons, firms, copartnerships, associations and governmental agencies, seeking to quiet title to real property situated within the County of Los Angeles and State of California, described as

Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said County;

and an order to show cause having issued directed to the persons, firms, corporations, copartnerships, associations and governmental agencies requiring

them to appear before the undersigned Referee in Bankruptcy at his courtroom in the Federal Building, Los Angeles, California, on December 14, 1950, at the hour of 10:00 o'clock a.m. [70] of said day, and to then and there establish any right, title, interest, lien or claim in their favor to the real property hereinbefore described, and to show cause why the Trustee should not be decreed to be the owner of said real property free and clear of any right, title, interest, lien, claim, or homestead right therein, and why the Trustee should not be authorized to sell said real property for the benefit of the bankrupt estate, and directing that personal service be made upon the minor respondents therein named, Frank Venes, Jr.; Ruth Venes, Mary Jane Venes, Judith Venes, John Doe Venes and Jane Doe Venes in the State of New Jersey, or wherever they may be residing, and that personal service be made if possible on the bankrupt, Ruth Vena Johnson, also known as Ruth Boyce, and Walter Johnson, also known as Walter G. Johnson, also known as Walter George Johnson, and service be made on the other respondents by mail; and it appearing to the Court from the return of service of the United States Marshal for the District of New Jersey that personal service was made on the respondents, Gladys Venes and John Doe Venes, her husband, whose true name is Frank Venes, and that personal service was likewise made upon said minor respondents, Frank W. Venes, Jr.; Ruth Venes, Mary Jane Venes, Judith Venes, John Doe Venes (whose true name is Ralph Venes), and Jane Doe Venes by said

United States Marshal for the District of New Jersey, as appears from his return of service on file herein, and that personal service was obtained on the bankrupt, Ruth Vena Johnson, also known as Ruth Boyce, at the California Institute for Women at Tehachapi, in Kern County, by service of five copies of said petition for order to show cause and order to show cause issued thereunder, on Ruth Vena Johnson, also known as Vena Ruth Johnson, for herself, and one copy each for the Boyce Realty Co., a corporation; one copy for the Boyce Realty Co., a fictitious firm name and style used by Ruth Vena Johnson, also known as Ruth Boyce; one copy for the Boyce Realty Co., a copartnership consisting of Ruth Vena Johnson and an [71] unknown partner or partners, and one copy for the Hollywood Real Estate School, owned and operated by the bankrupt as Louise Crooks; and that personal service was likewise obtained on Walter G. Johnson by serving one copy for himself and one copy for the Johnson Realty Co., as appears from the affidavit of service of R. J. Phelan herein filed; and all of the rest of the respondents having been duly served by mail, and an order having been made appointing Frank M. Chichester, guardian ad litem for the minor defendants, and each of them, under date of December 5, 1950, and after personal service of said minor defendants a supplemental order appointing the said Frank M. Chichester as guardian ad litem for said minor defendants, and said matter having been called for hearing on December 14, 1950, at 10:00 a.m., and because of the late date of

service on the respondent, Frank Venes, in Scotch Plains, New Jersey, and upon written request made by the bankrupt, Ruth Vena Johnson, for a continuance, the Court having continued the matter to January 25, 1951, at 10:00 o'clock a.m., and it appearing to the Court that counsel for the Trustee notified the defendants Venes of said continuance and of the appointment of Frank M. Chichester as guardian ad litem, and of their rights to enter their appearance in the matter before January 25, 1951, and no appearance having been entered on behalf of Gladys Venes or Frank Venes, and said matter having been called on January 25, 1951, at 10:00 a.m., the respondent Walter Johnson appearing in person and by his attorney, Louis Most, and the respondent Harry V. Mooney having filed an answer to said order to show cause but not having appeared at the trial, and the respondent Bank of America National Trust and Savings Association having appeared by its attorney, William J. Tiernan, and filed an answer, and the respondents Roy P. Schoettler and Roy P. Schoettler doing business as Pacific Coast Claim Adjusters, and Pearl Schoettler, named herein as Jane Doe Schoettler, having filed an appearance and waived any claim of interest in and to said real property, and the United [72] States Government appearing by Edward R. McHale, Assistant United States Attorney, and at the further adjourned hearing having appeared by Eugene Harpole, Special Assistant to the Attorney General, and the City of Los Angeles having appeared by C. J. Multhauf, Deputy City

Attorney, and the remainder of the respondents not appearing in any manner, and some testimony having been taken and the matter having again been adjourned to February 6, 1951, at which time there appeared Thomas S. Tobin, attorney for the Trustee, and Eugene Harpole, representing the Collector of Internal Revenue of the United States, and Frank M. Chichester, guardian ad litem for the minor children, respondents hereinbefore named, and testimony having been taken and evidence received and the Referee being fully advised in the premises, now finds the following facts:

I.

That George Gardner, Trustee in Bankruptcy for the bankrupt estate of Ruth Vena Johnson, also known as Ruth Boyce, is now in actual possession of real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as

Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said County;

that said real property was not scheduled in the bankrupt's schedules nor did the bankrupt make any attempt to claim the same as exempt; that she concealed said real property from her Trustee in Bankruptcy by means of a fraudulent transfer to

her daughter, Gladys Venes, and her minor children; that proceedings were instituted in the United States District Court for the Southern District of California, Central Division, on October 28, 1947, by the Trustee herein, to [73] set aside and avoid said fraudulent conveyance; that on February 10, 1949, a decree was entered by Honorable William C. Mathes, United States District Judge, before whom said action was tried, decreeing said transfer to be fraudulent and void as to creditors of said bankrupt and as to George Gardner, her Trustee, and avoiding the same, and decreeing the Trustee, George Gardner, to be the owner of said property; that said decree was appealed from by the bankrupt and affirmed by the United States Court of Appeals for the Ninth Circuit, has long since become final, and that it and its supporting pleadings and stipulations were received by the Court by reference and constitute the muniment of title of the Trustee.

II.

The Court finds that although the defendant Ruth Vena Johnson was named as a party defendant in said action and actively defended the same, that at no time during the course of said action did she set up as a defense the declaration of homestead which she had caused to be recorded in Book No. 21478, Page 52, of Official Records, and that she asserted her claim of homestead for the first time in this proceeding notwithstanding the decree of the United States District Court that the said transfer was fraudulent and void.

III.

The Court finds that the respondent Bank of America National Trust and Savings Association has a lien against said real property based on an abstract of judgment for \$67.00; that it was recorded more than four months before the filing of the petition in bankruptcy and constitutes a valid lien, and that the Trustee should pay the same.

IV.

The Court finds, based on stipulation entered into between C. J. Multhauf, Deputy City Attorney, and George Gardner, Trustee herein, that the abstract of judgment for \$31.05 filed by the Department of Water and Power was filed after bankruptcy, and the [74] Department of Water and Power has no lien on said real property.

V.

The Court finds that the respondent, Walter G. Johnson, has no right, title, interest, lien or claim in and to said real property, and his counsel, Louis Most, has so stipulated.

VI.

The Court finds that the lien of the judgment held by the respondent Harry V. Mooney expired on October 18, 1950, by virtue of the expiration of five years from the date of recordation and had ceased to be a lien on said real property.

VII.

The Court finds that in the action instituted in the United States District Court for the Southern District of California, described in Paragraph I herein, the respondent, Gladys Venes, was named as a party defendant and appeared therein and defended the same, together with the defendant Ruth Vena Johnson, and that at no time during the course of said action did she set up as a defense any declaration of homestead recorded by her or on her behalf on January 29, 1946, in Book 22,775, at Page 152, Official Records, nor any declaration of homestead.

The Court Concludes, as Conclusions of Law,
as Follows:

I.

That the Trustee being in lawful possession of the real property hereinbefore described at the time of the institution of this summary proceeding to quiet title, this Court has summary jurisdiction over the subject matter of this action, the real property in question and of the persons of the respondents herein.

II.

The Court concludes that the real property in question constituted property, title to which passed to the Trustee under the provisions of Section 70-a, Subdivisions 4 and 5, as property [75] transferred by the bankrupt in fraud of her creditors, and property which prior to the filing of the petition

she could by any means have transferred or which might have been levied upon or sold under judicial process against her, or otherwise seized, impounded or sequestered.

III.

The Court concludes that title to said real property was vested in the Trustee by virtue of the decree of the United States District Court for the Southern District of California, entered by Honorable William C. Mathes, United States District Judge, on February 10, 1949, subject to any valid liens or claims of record in the office of the County Recorder of Los Angeles County, State of California, where said real property is situated.

IV.

The Court concludes that none of the respondents herein have any right, title, interest, lien or claim against said real property, valid as against the Trustee, save and except the lien of the respondent Bank of America National Trust and Savings Association in the sum of \$67.00, as described in Paragraph III of the findings of fact.

V.

The Court concludes that George Gardner, as Trustee in Bankruptcy for the estate of Ruth Vena Johnson, also known as Ruth Boyce, bankrupt, is the owner of said real property free and clear of any claims or liens asserted by any of the respondents hereto, save and except the lien of the Bank

of America National Trust and Savings Association in the sum of \$67.00, and that the Trustee should be authorized to sell the same for the benefit of the bankrupt estate.

Based on the Foregoing Findings and Conclusions, the Court Makes the Following Order: [76]

Now on motion of Thomas S. Tobin, attorney for the Trustee, it is

Ordered, Adjudged and Decreed:

That George Gardner, Trustee in Bankruptcy for the estate of Ruth Vena Johnson, also known as Ruth Boyce, is the owner of real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as:

Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said County,

free and clear of any right, title, interest, lien or claim against the same, asserted by any of the respondents herein, save and except a lien based on an abstract of judgment in the sum of \$67.00 held by respondent Bank of America National Trust and Savings Association, as described in Paragraph III of the findings herein, which lien the Trustee is authorized and directed to pay.

It Is Further Ordered, Adjudged and Decreed that none of the other respondents herein have any right, title, interest, lien or claim in and to said real

property, and that the Trustee herein be authorized to sell the same as an asset of the bankrupt estate in conformity with the provisions of the National Bankruptcy Act respecting sales of property of bankrupt estates.

Done at Los Angeles, in the Southern District of California, this 14th day of February, 1951.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed February 14, 1951. [77] Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

PETITION FOR ORDER EXTENDING TIME
TO FILE PETITION FOR REVIEW OF
ORDER FOR SALE OF PROPERTY AND
DISALLOWING CLAIM FOR HOME-
STEAD EXEMPTION

To the Honorable Benno M. Brink, Referee in
Bankruptcy:

Comes now your petitioner, Joseph Mayer, and respectfully shows the referee:

That on or about February 15th, 1951, he was employed by the above-named bankrupt as her attorney. That said bankrupt is confined in the California Institute for Women at Tehachapi. That on or about February 14, 1951, an Order was made denying the claim of bankrupt for homestead ex-

emption and quiet title to certain real property described in said Order.

That it is the intention of your petitioner to file a petition for review of said Order, but that before properly preparing such petition it is essential for him to thoroughly study the pleadings and to make certain investigation and study the laws in connection with the subject matter. That it would take at least thirty (30) days to do this.

Wherefore, your Petitioner prays that the time of the bankrupt to file petition for the review of aforesaid Order be extended for at least thirty (30) days.

/s/ JOSEPH MAYER,
Petitioner.

Duly verified.

[Endorsed]: Filed February 23, 1951. [78]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

ORDER EXTENDING TIME WITHIN WHICH
TO FILE PETITION FOR REVIEW OF
ORDER QUIETING TITLE TO REAL
PROPERTY

Upon the reading and filing of the petition of Joseph Mayer, attorney for the above-named bankrupt, for an extension of time within which to file a petition for review of the Order made on February 14, 1951, to quiet title to real property.

Good Cause Appearing it is Hereby Ordered that the time of the bankrupt to file a petition for review of the aforesaid order quieting title to real property be, and hereby is extended to and including March 23, 1951.

Dated: February 23, 1951.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed February 23, 1951, [80]
Referee.

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

PETITION FOR REVIEW

To the Honorable District Court of the United
States, Southern District of California, Central Division

Comes now your Petitioner, Ruth Vena Johnson,
aka Ruth Boyce, and respectfully shows:

I.

That on or about February 14, 1951, the Honorable Benno M. Brink, Referee in Bankruptcy, made an Order denying the Homestead claim of the bankrupt and quieting title in the name of the Trustee in Bankruptcy in the above matter, in premises known as 6417 Drexel Avenue, Los Angeles, California, more particularly described as

“Lot 4, Block 29, Tract 7555, City of Los Angeles, as per Book 88, Pages 79 to 84 of Records in the office of the County Recorder of the County of Los Angeles.”

II.

That the aforesaid Order and Judgment quieting title is based upon findings contained in said Order, which are erroneous and contrary to law. [96]

III.

That the court made a finding that the real property in question was concealed by the bankrupt and not scheduled, nor did bankrupt make any attempt to claim homestead exemption. This finding is erroneous inasmuch as the bankrupt prior to filing her petition in bankruptcy had made a conveyance of said property to her daughter, Gladys Venes, and she could not properly have scheduled it as an asset in her bankruptcy petition. Had she done so it would have placed a cloud on the title to the property.

IV.

The Referee's findings that the bankrupt concealed the real property in question from her Trustee in Bankruptcy by means of a fraudulent transfer to her daughter is erroneous for the reason that the creditors could not possibly have had any interest in said property except such as would be over and above her homestead exemption of \$7500.00, inasmuch as the bankrupt had filed a declaration of homestead Prior to Filing Her Petition in Bankruptcy.

V.

The Referee also found that the bankrupt did not set up as a defense her claim for homestead exemption in an action by George Gardner, as Trustee, to have declared void a transfer of the real property in question to the bankrupt's daughter, which action was tried in the United States District Court before Honorable William C. Mathis.

This finding is erroneous for the reason that the issue in that action was solely whether or not the transfer to the daughter of the bankrupt was void and in the proceeding the Principal Defendant Was the Daughter. The bankrupt therefor could not properly, in that proceeding, claim a homestead. It Was Only After the Decree in the United States District Court Declaring the Transfer to Gladys Venes Void and Judgment That the Property Belonged to the Bankrupt Did She Have Any Right to Assert Her Homestead Rights, Nor [97] Schedule the Property as One of Her Assets.

VI.

The findings and Order of the Referee, Honorable Benno M. Brink, based on the judgment of Honorable William C. Mathis, is erroneous for the reason that the judgment of said Honorable William C. Mathis was itself erroneous, at least insofar as the judgment is to effect that the transfer by the bankrupt to her daughter of the property in question was to defraud her creditors, for the reason that the bankrupt having prior to filing her petition in bankruptcy filed a declaration of home-

stead exemption on the property in question, and the transfer to her daughter of said property could not properly have been held to be in defraud of creditors, At Least Not Over and Above Her Own Homestead Exemption of \$7500.00.

Wherefore, Petitioner prays that the Order made by the Honorable Benno M. Brink on or about February 14, 1951, quieting title to the real property hereinbefore referred to, and denying the Homestead claim of the bankrupt, be reviewed, vacated and set aside.

/s/ RUTH VENA JOHNSON,
Petitioner.

/s/ JOSEPH MAYER,
Attorney for Petitioner.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 22, 1951, Referee. [98]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

SUPPLEMENT TO REFEREE'S CERTIFICATE
ON PETITIONS FOR REVIEW OF
ORDER QUIETING TITLE TO REAL
PROPERTY

To the Honorable Leon R. Yankwich, Judge of the
Above-Entitled Court:

At the request of counsel for George Gardner,
the trustee in bankruptcy herein and one of the

respondents on review in this matter, I, Benno M. Brink, one of the Referees in Bankruptcy of the said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby supplement my Referee's Certificate on Petitions for Review of Order Quieting Title to Real Property, which I filed in this proceeding on April 5, 1951, by making the following statement from the papers in this case:

I transmit herewith a photostat of Schedule B-5, page 13, of the schedules in bankruptcy filed by the bankrupt herein on April 24, 1947.

The aforesaid George Gardner, the trustee in bankruptcy in this matter, did not file in this case any report of exempted property. It is customary in a bankruptcy [100] for the Referee to make an order upon the trustee's report of exempted property, but since no such report was filed in this case no such order was made in this matter.

Respectfully submitted this 28th day of June, 1951.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed June 28, 1951, U.S.D.C. [101]

[Title of District Court and Cause.]

No. 44,916-Y Bkey

OPINION ON PETITION FOR REVIEW

Appearances:

For the Trustee:

THOMAS S. TOBIN,
Los Angeles, California.

For the Bankrupt:

JOSEPH MAYER,
Beverly Hills, California. [103]

Yankwich, District Judge:

Ruth Vena Johnson was adjudicated a bankrupt on April 24, 1947, upon a voluntary petition. On November 18, 1941, she filed a declaration of homestead on certain residential property, which was duly recorded as required by the law of California. (California Civil Code, Secs. 1237 et seq.)

On December 2, 1944, she executed a deed of gift by which she attempted to convey the property on which the homestead had been declared to her daughter and "her children." The deed was recorded on December 29, 1944.

On December 14, 1944, she executed a grant deed to the same property to her daughter, which was recorded on January 16, 1945.

In the course of the administration of the estate, the Trustee, on October 28, 1947, instituted an

action in this court to avoid the conveyance. After trial, the court, Judge William C. Mathes, found that the execution of the instruments was without fair consideration and in fraud of the creditors then existing and future creditors, in violation of Section 70(e) of the Bankruptcy Act of 1938, and Sections 3439.02, 3439.03, 3439.04 and 3439.07 of the Civil Code of California. Specifically, the Court's findings referred to the fact that the conveyance was to defraud Harry V. Mooney, one of the creditors in this proceeding, to whom, on December 2, 1944, she was indebted in the sum of \$10,000.00 or more. (Findings VIII and XI.) [104]

A judgment was entered on February 10, 1949, setting aside the conveyances as "fraudulent and void as to the creditors of the defendant, * * * and as to George Gardner, her trustee in bankruptcy."

The bankrupt did not set up the homestead right in her Answer and the Court, in the decree, made no adjudication as to its validity. The decree has become final.

On February 14, 1951, after a hearing upon an Order to Show Cause why the title of the Trustee to the property should not be quieted against the bankrupt and others, the Referee made an order declaring that George Gardner, as Trustee in Bankruptcy, was the owner of the property on which the homestead had been filed, free and clear of any right, title and interest asserted by the bankrupt.

This is a petition to review the Order.

I.

The Abandonment of Homesteads
Under California Law

The only question presented is whether the homestead rights of the bankrupt still subsist. Many questions relating to state exemptions in bankruptcy are covered by the writer's opinion in *re Dudley*, 1947, D. C. Calif., 72 F. Supp. 943, which, on appeal was adopted by the Court of Appeals for the Ninth Circuit. (See, *Groggin v. Dudley*, 1948, 9 Cir., 166 F(2) 1023.) So, to avoid repetition, only the specific norms which govern the determination of this matter not there treated will be referred to. The most [105] important of these is that the trustee in bankruptcy acquires only such property as is not exempt under the state law. (Bankruptcy Act, Sections 6, 7(A) (8), 11 U.S.C.A. Secs. 24, 25(A) (8).) The right to exemption is governed by state law. (*Turner v. Bovee*, 1937, 9 Cir., 92 F(2) 791; *Negin v. Salomon*, 1945, 2 Cir., 151 F(2) 112; *In re Dudley*, *supra*, and cases cited in Note 3; *In re Fogel*, 1947, 7 Cir., 164 F(2) 214, 215-216; 3 *Remington on Bankruptcy*, 4th Ed., 1941, Sec. 1278.)

This rule is not affected by the provision of the bankruptcy law to the effect that exemptions shall not be allowed out of property which a bankrupt transferred or cancelled and which is recovered by the Trustee. (Bankruptcy Act, Sec. 6, 11 U.S.C.A., Sec. 24.) Under this provision, property recovered

by the Trustee in bankruptcy must be distributed to the creditors and cannot be impressed with an exemption. That is all that *Moore v. Bay*, 1931, 284 U. S. 4, decided under the old Act, teaches, and it does not mean that where, as here, a proper homestead declaration existed at the time of bankruptcy and an intervening attempt to convey the same property has been invalidated, the right to the homestead cannot be recognized in bankruptcy court. Under the law of California, a homestead may be abandoned by "a grant thereof." (California Civil Code, Sec. 1243.)

A "grant," under this section, implies a conveyance effective as a transfer of title. (California Civil Code, Sec. 1242; *Faivre v. Daley*, 1892, 92 C. 664; *Bank of Suisun v. Stark*, 1895, 106 C. 202; *White v. Rosenthal*, 1934, 140 C. A. 184; *First Trust & Savings Bank v. Warden*, 1936, 18 C. A. (2) 131; *Dixon v. [106] Russell*, 1937, 9 C (2) 262.) Thus, a defectively executed deed, not accompanied by possession, would not work as an abandonment. (40 C.J.S., Homesteads, Sec. 173, p. 655.)

In the present case, the bankrupt's attempts to deed the property to her daughter were declared fraudulent, both under the state law and the Bankruptcy Act, at the suit of the Trustee. The attempted conveyances having been set aside, the property is in the same status it had before the deed was executed, i.e., subject to the burden of the homestead. It is as though the conveyance had been made without consideration or subject to reservations showing an intention not to part with title

—of the type which California courts have held to be ineffective to abandon the homestead. (See *Palen v. Palen*, 1938, 28 C.A. (2) 602; *Arighi v. Rule & Sons, Inc.*, 1940, 41 C.A. (2) 852, 856; *Vieth v. Klett*, 1948, 88 C.A. (2) 23.)

II.

Homesteads Not Subject to Law of Fraudulent Conveyances

We must give full effect to these decisions and all their implications, unless we are satisfied that the bankrupt's fraudulent acts in dealing with the property warrants her being deprived of the benefit of the homestead. That question must be determined by the state law. And the law of California for over sixty years has been that the doctrine which invalidates fraudulent conveyances against creditors has no application to the creation of a homestead. In one of the earliest cases on the subject (*Fitzell v. Leaky*, 1887, 72 C. 477, 482) the principle [107] was stated in this language:

“The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead.”

This principle, in the same language, has since been repeated, without variation in a large number of cases. Among them are: *Beaton v. Reid*, 1896, 111 C. 484, 487; *Simonson v. Burr*, 1898, 121 C. 582, 587; *Gray v. Brunold*, 1903, 140 C. 615, 624 (where the action to set aside a fraudulent conveyance was instituted by a trustee in bankruptcy); *Schmidt v.*

Denning, 1931, 117 C.A. 36, 39; Yager v. Yager, 1936, 7 C (2) 213, 217; Montgomery v. Bullock, 1938, 11 C (2) 58, 62; Parker v. Riddell, 1940, 41 C.A. (2) 908, 914 (in which the trustee in bankruptcy attacked the homestead); Duhart v. O'Rourke, 1950, 99 A.C.A. 318, 321.

The Court of Appeals for the Ninth Circuit in Turnbeaugh v. Santos, 1944, 9 Cir., 146 F (2) 168, adopted the doctrine declared by these cases (citing the latest among them) in setting aside a district court order which had refused to give it full scope.

I do not believe we are in a position to disregard these cases—satisfied though we may be, as the Referee was, that the bankrupt has been guilty of brazen fraud in dealing with her creditors. For, in the last analysis, if, by legislative policy, courts of California have chosen to give absolution to homestead declarations from acts of a fraudulent character, we cannot recall it. Nor can we give life to an attempted abandonment [108] which is ineffective under California law. As already stated, the basis for the finding that the conveyances to the daughter were a fraud on creditors was that they were motivated by the threat by Harry V. Mooney, to institute an action to recover from the bankrupt the sum of \$10,000.00 upon transactions alleged to have taken place between August 23, 1944, and September 26, 1944. Mooney had judgment for \$10,-970.64 on October 5, 1945, and his right to the claim in that amount was before the Referee in the proceeding under review. The findings of the Court in the action to set them aside to the effect that the

conveyances were in fraud of the creditors are reinforced by one of the findings of the Referee in denying discharge, which has already been affirmed by this Court, that, notwithstanding the conveyances to the daughter, the bankrupt retained possession and an interest in the property attempted to be conveyed and received income from it, which she concealed. This puts the case in the ambit of the principle already referred to that a conveyance whereby an interest is retained is not an abandonment of the homestead. (See, especially, *Arighi v. Rule & Sons, Inc.*, supra, pp. 855, 856; *Vieth v. Klett*, supra, pp. 27-28. And see 13 R.C.L., *Homesteads*, Sec. 118, pages 659-661; 26 Am. Jur., *Homesteads*, Sec. 199.) And a conveyance to defeat creditors is not an abandonment. In *Palen v. Palen*, 1938, 28 C.A. (2) 602, the Court, after referring to the various exceptions to the rule that a conveyance is, ordinarily, an abandonment, [109] states:

“Neither is a homestead abandoned by a conveyance made for the purpose of avoiding creditors.” (p. 606.)

In reaching this conclusion, the Court adopts as its own the reasons given in 13 R.C.L., loc. cit., p. 660:

“A homestead is not liable to seizure under execution, and therefore a conveyance of it is a question in which the creditor has no interest. It was not liable before conveyance to the claim he asserts; and the conveyance, though fraudulent, puts the creditor in no better condition than he was in before. If the conveyance is set

aside as fraudulent this leaves the homestead as if no attempt had been made to convey it, so far as any claim can be asserted by the creditor. It is void as to him to all intents and purposes. He cannot be heard to say in one and the same breath that the conveyance is void in its attempt to divest title out of the debtor, but valid in destroying the homestead right. He cannot claim both under and against the conveyance; under it as a valid parting with the homestead right; against it as an abortive effort to pass title out of the debtor. It must stand as to him as if no conveyance had been attempted." [110]

This summary is a correct distillation of the rulings in a large group of cases from many American jurisdictions. And there has been no recent deviation from them. To the contrary, the latest adjudicated cases and writers on the subject confirm them and the reasons behind them. See 24 Am. Jur. Fraudulent Conveyances, Sec. 109; 37 C.J.S., Fraudulent Conveyances, Sec. 31; *Wood v. Emig*, 1943, 58 C.A. (2) 851, 859, 861, in which a hearing by the Supreme Court of California was denied. *In re Rohl*, 1929, 8 Cir., 34 F (2) 268, 270, applying the homestead law of South Dakota; *Smith v. Jackson State Bank*, 1933, 10 Cir., 63 F (2) 934, 936, applying the homestead law of Wyoming; and the following cases applying the homestead law of Missouri: *Farmers' Bank of Higginsville v. Handley*, 1928, 320 Mo. 754, 9 S.W. (2) 880, 894-895; *May v. Gibler*, 1928, 319 Mo. 672, 4 S.W. (2) 769,

772; *Bank of New Cambria v. Briggs*, 1951, 236 S.W. (2) 289, 293.

These cases merely apply to homesteads the general rule that a conveyance of exempt property of any kind is not in fraud of creditors: 24 Am. Jur., *Fraudulent Conveyances*, Sec. 109; *The Prudential Life Insurance Co. v. Beck*, 1940, 39 C.A. (2) 355, 360-361; *Sharp v. Hawks*, 1936, 8 Cir., 80 F(2) 731, 732; *Citizens National Bank v. Turner*, 1937, 5 Cir., 89 F (2) 600, 601.

One of the older cases has summed up these decisions in a brief statement with a Biblical overtone:

“The homestead and other statutory exemptions are forbidden fruit to the creditor. He may neither pluck nor eat thereof.” (*Walther v. Null*, 1911, 233 Mo. 104, 122, 134 S.W., 993, 999.) [111]

In *Wetherly v. Straus*, 1892, 93 C. 282, 286, the Supreme Court of California, in protecting against creditors' money derived from the sale of the homestead, said:

“The homestead from which the money was derived was not subject to the claim of any creditor of the plaintiff's husband, and a transfer of it by the husband to her could not, under any circumstances, be held as a matter of fact to be with the intent to defraud his creditors. His creditors could not, by any legal process, take the property covered by the homestead, and its voluntary transfer to the wife would not ‘obstruct the enforcement by legal process of

any right to take the property affected by the transfer.' (Civil Code, Sec. 2441.) Neither would such transfer of its proceed."

See, *Estate of Fath*, 1901, 132 C. 609, 613; *Yardley v. San Joaquin Valley Bank*, 1906, 3 C.A. 651, 656.

In brief, no one is a creditor as to exempt property, within the meaning of the law of fraudulent conveyances. (*The Prudential Ins. Co. v. Beck*, supra; *Nicholson v. Nesbit*, 1906, 2 C.A. 585, 587-588. And see, *Luhrs v. Hancock*, 1901, 181 U.S. 567, 570.)

The logic of these rulings cannot be gainsaid. As the creditor cannot subject the homestead to the satisfaction of his debt, a conveyance of it cannot injure him. For he is not harmed [112] by being deprived of the right to subject to the satisfaction of his claim property not subject to seizure. Otherwise put, if the homestead is valid, no attempted disposition or conveyance of the property, however fraudulent, injures the creditor. For such act, whether successful or not, leaves the creditor in the same position in which he would have been before it was done.

As said in *Citizens National Bank v. Turner*, supra, p. 601:

"When property is immune from seizure by the creditor, he has no legal interest in it and cannot complain of its transfer, even though the conveyance was voluntary, with bad motive and to avoid creditors."

The application of these principles to the situation which confronts us in this case means that the

bankrupt's deed to her daughter having been set aside, the claim of homestead remains intact. The bankrupt has done nothing in this court which can be interpreted as a waiver of her right to the homestead. To the contrary, she has asserted it repeatedly, in these proceedings, although, at times and because of lack of counsel, inexpertly. But even if she had not asserted it before, when the Trustee made her a respondent to his petition for the Order to Show Cause and sought to have his title to the property quieted against her, and she appeared, the right to the homestead was put in issue. The Referee's Order adjudicated it. And if that adjudication is erroneous, it matters not that the bankrupt did [113] not, prior to the Order to Show Cause, ask that her homestead rights be recognized. (See, *In re Etherton*, 1950, D.C. Cal., 88 F. Supp. 874, 878-879.) For, from this challenge, accepted by the bankrupt, came an order which, if reversed, leaves the bankrupt's assertion of her homestead rights intact.

The Order of the Referee, dated February 14, 1951, insofar as it relates to the rights of the bankrupt to the homestead property is reversed.

Dated this 16th day of May, 1951.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed May 16, 1951, U.S.D.C. [114]

In the District Court of the United States,
Southern District of California, Central Division
In Bankruptcy No. 44,916-Y

In the Matter of

RUTH VENA JOHNSON, aka RUTH BOYCE,
Bankrupt,

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND ORDER REVERSING REF-
EREE'S ORDER

The above-entitled matter coming on for hearing on April 30, 1951, on review of the order of Referee Benno M. Brink, quieting title to real property situated in the County of Los Angeles and State of California, and described as

Lot 4, in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles, State of California, as per Map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said County,

said review having been petitioned for by the bankrupt, Ruth Vena Johnson, and the Referee having filed his certificate on review herein, and the petitioner on review, the bankrupt, appearing by her attorney, Joseph Mayer, and the Trustee appearing by his attorney, Thomas S. Tobin, and the matter having been argued and briefs having been filed, and the Court [115] having written and filed its opinion on said review, now makes the following findings of fact:

Findings of Fact

I.

That on November 18, 1944, the bankrupt recorded a declaration of homestead on said real property in the office of the County Recorder of Los Angeles County, State of California.

II.

The Court finds that on December 2, 1944, the bankrupt executed a deed of gift to her daughter, Gladys Venes, and her daughter's children; that she recorded this deed on December 29, 1944, in the office of the County Recorder of the State of California; that in said deed the bankrupt reserved the right to occupy the premises during the life of herself and husband.

III.

The Court finds that on December 14, 1944, the bankrupt executed another grant deed to the same property to her daughter and that the same was recorded on January 16, 1945; that bankrupt continued to occupy said premises until trustee took possession thereof.

IV.

The Court finds that on April 24, 1947, the bankrupt, Ruth Vena Johnson, filed her voluntary petition in bankruptcy in this Court and was adjudicated a bankrupt; that coincidental with the filing of said petition, the bankrupt filed and swore to her schedules in bankruptcy; that in said schedules

the bankrupt swore in Schedule B-1 that she had no real estate, and in Schedule B-5 she claimed no property as exempt.

V.

The Court finds that George Gardner was the duly appointed, qualified and acting Trustee in bankruptcy of the bankrupt estate of Ruth Vena Johnson; that in the course of the [116] administration of the estate, the Trustee, on October 28, 1947, instituted an action in this court to avoid the conveyance. After trial, the court, Judge William C. Mathes, found that the execution of the instruments was without fair consideration and in fraud of the creditors then existing and future creditors, in violation of Section 70(e) of the Bankruptcy Act of 1938, and Sections 3439.02, 3439.03, 3439.04 and 3439.07 of the Civil Code of California. Specifically the Court's findings referred to the fact that the conveyance was to defraud Harry V. Mooney, one of the creditors in this proceeding, to whom, on December 2, 1944, she was indebted in the sum of \$10,000.00 or more.

(Findings VIII and XI.)

A judgment was entered on February 10, 1949, setting aside the conveyances as "fraudulent and void as to the creditors of the defendant, * * * and as to George Gardner, her trustee in bankruptcy."

The bankrupt did not set up the homestead right in her Answer and the Court, in the decree, made no adjudication as to its validity. The decree has become final.

VI.

The Court finds that on November 9, 1950, the Referee upon the petition of the trustee issued an Order requiring the bankrupt, and others, to appear and show cause before said Referee on December 14, 1950, and then and there establish any right, title, interest, lien or claim in their favor to real property situate within the County of Los Angeles and State of California, described as:

Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per Map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the office of [117] the County Recorder of said County,

and show cause why the trustee should not be decreed to be the owner of said real property free and clear of any right, title, interest, lien, claim, or homestead right therein, and why the trustee should not be authorized to sell said real property for the benefit of the bankrupt estate, and the

Referee Further Ordered, that any of the respondents seeking recognition of any right, title, interest, lien or claim in their favor against said real property, file their answer in writing with this Court, asserting their right, title, interest, lien or claim thereto at least five (5) days prior to the date of hearing thereon.

The Court finds that the aforesaid order was served upon the bankrupt in the California Institute for Women at Tehachapi where she was then

and at all times since has been and still is confined.

The Court finds that the bankrupt in response to the aforesaid Order, as set out in the Certificate of the Referee, did file on December 11, 1950, an instrument captioned "Claim to Homestead Exemption," and on January 6, 1951, a further instrument captioned Homestead Exemption Claim, in which the bankrupt claimed an exemption of \$7,500.00 by reason of her homestead declaration.

VII.

The Court finds that on February 14, 1951, after a hearing upon an Order to Show Cause why the title of the trustee to the property should not be quieted against the bankrupt and others, the Referee made an order declaring that George Gardner, as Trustee in Bankruptcy, was the owner of the property on which the homestead had been filed, free and clear of any right, title and interest asserted by the bankrupt.

Based on the foregoing findings of fact, the [118] Court makes the following:

Conclusions of Law

I.

The Court concludes that the declaration of homestead filed by the bankrupt on November 18, 1944, was not affected by the bankrupt's attempts to deed the property to her daughter. The attempted conveyances having been set aside, the property is in the same status it had before the deed was executed, i.e., subject to the burden of the homestead.

II.

The Court concludes that the 1938 amendment to Section 6 of the National Bankruptcy Act does not stand in the way of recognizing the homestead rights of the bankrupt.

III.

The Court concludes that the attempted conveyance by the bankrupt to her daughter of said real property did not operate as an abandonment of her homestead under the provisions of Section 1243 of the California Civil Code.

IV.

The Court concludes that by the filing of said petition of the Trustee, the issuing of the said Order to Show Cause, and the response thereto of the bankrupt and other respondents, the bankrupt's right to said homestead was put in issue in the bankruptcy proceeding.

That the Order of the Referee referred to in the next paragraph (V.) adjudicated said right and the said matter is before this Court for final determination as an adjudication of said homestead right asserted in bankruptcy court by the claimant under the homestead.

V.

The Court concludes that the bankrupt is entitled to a homestead exemption in said property to the extent of [119] the amount allowed by Section 1260 of the Civil Code of California, or the sum of \$7,500.00.

And based on the foregoing findings of fact and conclusions of law, makes the following order:

Ordered that Paragraph I, on page 4, line 30 of the finding of fact in the Order of the Referee entered herein on the 14th day of February, 1951, reading as follows:

“nor did the Bankrupt make any attempt to claim the same as exempt”;

and that line 15 on page 5 reading as follows:

“reference and constitute the muniment of title of the Trustee,” [120]

be and the same are hereby stricken.

It is furthered Ordered that Paragraph IV, on page 7, of the conclusions of law in said order reading as follows:

“The Court concludes that none of the respondents herein have any right, title, interest, lien, or claim against said real property, valid as against the Trustee, save and except the lien of the respondent Bank of America Trust and Savings Association in the sum of \$67.00, as described in Paragraph III of the findings of **fact.**”

be and the same is hereby stricken and the following conclusion of law is hereby substituted therefor:

“The Court concludes that none of the respondents herein have any right, title, interest, lien or claim against said real property, valid

as against the Trustee save and except the lien of the respondent Bank of America Trust and Savings Association in the sum of \$67.00, as described in Paragraph III of the fact, and save and except the lien of the respondent Harry V. Mooney in the sum of \$10,970.64, as described in Paragraph VI of the findings of fact, subject to the homestead exemption of the bankrupt, Ruth Vena Johnson, aka Ruth Boyce, and her homestead exemption rights in said property.”

It is further Ordered that Paragraph V, on pages 7 and 8 of the conclusions of law in said order reading as follows:

“The Court concludes that George Gardner, as Trustee in bankruptcy for the estate [121] of Ruth Vena Johnson, aka Ruth Boyce, bankrupt, is the owner of said real property free and clear of any claims or liens asserted by any of the respondents hereto, save and except the lien of the Bank of America National Trust and Savings Association in the sum of \$67.00, and that the Trustee should be authorized to sell the same for the benefit of the bankrupt estate.”

be and the same is hereby stricken, and the following conclusion of law be and the same is hereby substituted therefor:

“The Court concludes that George Gardner, as Trustee in bankruptcy for the estate of Ruth Vena Johnson, aka Ruth Boyce, bankrupt, is

the owner of said real property free and clear of any claims or liens asserted by any of the respondents hereto, save and except the liens of the Bank of America National Trust and Savings Association in the sum of \$67.00, and of Harry V. Mooney in the sum of \$10,970.64, and that the Trustee should be authorized to sell the same for the benefit of the bankrupt estate, subject to the homestead exemption of the bankrupt, Ruth Vena Johnson, aka Ruth Boyce, and her rights in said property.”

It is finally Ordered that that portion of said order reading as follows:

“Based on the Foregoing Findings and Conclusions, the Court Makes the Following Order:

“Now on motion of Thomas S. Tobin, attorney for the Trustee, it is [122]

“Ordered, Adjudged and Decreed:

“That George Gardner, Trustee in bankruptcy for the estate of Ruth Vena Johnson, aka Ruth Boyce, is the owner of real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as:

Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California as per map recorded in Book 88, pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said County,

free and clear of any right, title, interest, lien or claim against the same, asserted by any of the respondents herein, save and except a lien based on an abstract of judgment in the sum of \$67.00 held by respondents Bank of America National Trust and Savings Association, as described in Paragraph III of the findings herein, which lien of the trustee is authorized and directed to pay.”

be and the same is hereby stricken and the following be and the same is hereby substituted therefor:

“Based on the Foregoing Findings of Fact and Conclusions of Law the Court Orders, Adjudges and Decrees as Follows:

“That George Gardner, Trustee in Bankruptcy for the estate of Ruth Vena Johnson, aka Ruth Boyce, is the owner of real property situate in the City of Los Angeles, County of Los Angeles, State of California, [123] described as:

Lot 4 in Block 29 of Tract No. 7555, in the City of Los Angeles, County of Los Angeles and State of California, as per map recorded in Book 88, pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of said

County;

free and clear of any right, title, interest, lien or claim against the same, asserted by any of the respondents herein, save and except a lien based on an abstract of judgment in the sum of

\$67.00 held by respondent Bank of America National Trust and Savings Association, as described in Paragraph III of the findings herein, and save and except a lien based on an abstract of judgment in the sum of \$10,970.64 held by respondent Harry V. Mooney, as described in Paragraph VI of the findings herein, which liens the Trustee is authorized and directed to pay, subject to the homestead exemption of the Bankrupt, Ruth Vena Johnson, aka Ruth Boyce, and her rights in said property in the sum of \$7,500.00."

Done at Los Angeles, in the Southern District of California, this 31st day of May, 1951.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to Form Under Local District Rule:

/s/ THOMAS S. TOBIN,
Attorney for Trustee.

Order entered June 1, 1951, U.S.D.C.

[Endorsed]: Filed May 31, 1951. U.S.D.C. [124]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

NOTICE OF APPEAL

To the Clerk of the Above-Named Court, and to
Ruth Vena Johnson Also Known as Ruth

Boyce, and to Joseph Mayer, 450 North Beverly Drive, Beverly Hills, California, Her Attorney:

Notice Is Hereby Given that George Gardner, as Trustee in bankruptcy for the above-named bankrupt estate, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the findings of fact and conclusions of law and order reversing Referee's order entered in this Court on June 1, 1951, in Judgment Book 72, Page 732, and from the holder thereof.

Dated at Los Angeles, Southern District of California, this 5th day of June, 1951.

/s/ THOMAS S. TOBIN,
Attorney for Trustee and
Appellant.

[Endorsed]: Filed June 6, 1951, U.S.D.C. [125]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

POINTS ON WHICH APPELLANT
INTENDS TO RELY ON APPEAL

Point I.

That the District Judge erred in reversing the order of Referee Benno M. Brink, quieting title to the real property in controversy as against the bankrupt.

Point II.

That the District Judge erred in refusing to affirm the order of the Referee quieting title to the real property in controversy in favor of the Trustee and against the bankrupt, and denying the bankrupt a homestead exemption herein.

Point III.

That the District Judge erred in concluding that the 1938 amendment to Section 6 of the National Bankruptcy Act does not stand in the way of recognizing the homestead rights of the bankrupt in and to said real property.

Point IV.

That the District Judge erred in allowing the bankrupt a [126] homestead exemption of \$7500.00 in said real property based on a declaration of homestead recorded on November 18, 1944, at a time when the State law of California permitted a homestead exemption to the head of a family in the sum of only \$5000.00, there being no evidence that any subsequent declaration of homestead was filed by the bankrupt.

Point V.

That the District Judge erred in holding that the bankrupt was entitled to exemptions out of property which she had transferred or concealed and which had been recovered, and the transfer of which was avoided under this Act for the benefit of the estate in direct contravention of the provi-

sions of Section 6 of the National Bankruptcy Act as amended in 1938.

Point VI.

That the District Judge erred in ignoring the decree of Judge William C. Mathes of the United States District Court for the Southern District of California, Central Division, entered February 10, 1949, avoiding the fraudulent conveyance by the bankrupt of this property, which decree had been affirmed by this Court, petition for writ of certiorari denied by the Supreme Court of the United States, and in which the mandate of this Court was on file, and which proceedings were in evidence in the above-entitled matter by reference, including pleadings, findings of fact, conclusions of law, decree and mandate.

Point VII.

That the District Judge erred in concluding that the declaration of homestead filed by the bankrupt on November 18, 1944, was not affected by the bankrupt's attempts to deed the property to her daughter, and that the setting aside of said fraudulent conveyance left the property in the same status as it had been before the deed was executed subject to the burden of the homestead, and in concluding that her attempted conveyance to her [127] daughter did not operate as an abandonment of her homestead under the provisions of Section 1243 of the California Civil Code.

Point VIII.

That the District Judge erred in not concluding that the bankrupt was estopped from claiming any exemption in said property by virtue of the decree of Judge William C. Mathes of February 10, 1949, decreeing that the Trustee was the owner of said property in an action in which the bankrupt was a party and was appellant in this Court, and which decree had long since become final.

Dated: June 5, 1951.

/s/ THOMAS S. TOBIN,
Attorney for Trustee and
Appellant.

[Endorsed]: Filed June 6, 1951. U.S.D.C. [128]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

DESIGNATION OF PARTS OF THE
RECORD ON APPEAL

To Edmund L. Smith, Clerk of the Above-Named
Court:

You will please prepare record on appeal in the above-entitled matter and include therein the following documents:

1. Voluntary petition in bankruptcy of Ruth Vena Johnson in case No. 44,916-Y.
2. Order of adjudication.

3. Bankrupt's schedules dated April 23, 1947, including only Schedule B-1, Real Estate; B-4, Property in Reversion, Remainder, Expectancy or Trust; B-5, Property Claimed as Exempt, with a statement that same was verified April 23, 1947, before Milton M. Cohen, Jr., Notary Public.

4. Order of adjudication and of general reference.

5. Order approving Trustee's bond.

6. Amended complaint to avoid fraudulent conveyances of real property, in action No. 7723-WM.

7. Answers of the defendants to the amended complaint [129] in action No. 7723-WM.

8. Findings of fact and conclusions of law, action No. 7723-WM.

9. Decree of Judge Mathes in action No. 7723-WM.

10. Mandate of United States Court of Appeals for the Ninth Circuit, affirming decree in action No. 7723-WM.

11. Petition for order to show cause quieting title to real property in action No. 44916-Y.

12. Order to show cause issued thereunder.

13. Answer of bankrupt to order to show cause.

14. Referee's findings of fact, conclusions of law and his order quieting title to real property.

15. Bankrupt's petition for review of Referee's order quieting title to real property.

16. Referee's certificate on review.
17. Findings of fact and conclusions of law and order reversing Referee's order, District Judge Yankwich.
18. Notice of appeal.
19. Points on which appellant intends to rely on appeal.
20. This designation.

/s/ THOMAS S. TOBIN,
Attorney for Appellant.

[Endorsed]: Filed June 6, 1951. [130]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

Ruth E. Spangler, being first duly sworn, on oath, deposes and says: That she is a citizen of the United States over the age of twenty-one years, and not a party to the above-entitled matter, or interested therein.

That on the 6th day of June, 1951, she deposited a copy of Notice of Appeal, Points on which Appellant intends to Rely, and Designation of Parts of

the Record on Appeal in an envelope addressed to the following:

Joseph Mayer,
450 North Beverly Drive,
Beverly Hills, California;

and after carefully sealing said envelope so containing said copy as aforesaid, and after affixing thereon the postage required by law, she deposited said envelope in the United States Post Office at Los Angeles, California; that there is a regular communication by mail from said Post Office of deposit to the place so addressed.

/s/ RUTH E. SPANGLER.

Subscribed and Sworn to before me this 6th day of June, 1951.

[Seal] /s/ C. W. ROBINSON,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires August 16, 1952.

[Endorsed]: Filed June 7, 1951. [131]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

APPELLANT'S SUPPLEMENTAL DESIGNA-
TION OF PARTS OF THE RECORD ON
APPEAL

To Edmund L. Smith, Clerk of the Above-Named
Court:

The undersigned appellant hereby supplements his original designation of parts of the record on appeal and requests that you send up the following documents in the above-entitled action:

1. Trustee's report of exempt property (with Referee Brink).

2. Order of Referee approving Trustee's report of exempt property.

3. This supplemental designation.

In preparing the record, with the exception of the voluntary petition in the matter of Ruth Vena Johnson, bankrupt, all subsequent documents in that bankruptcy proceeding may be captioned only "Title of Court and Cause."

Any exhibits in the case of Gardner, Trustee, vs. Venes, et al., received in evidence by reference after the amended answer in said action which should contain the names of all defendants [132] named therein, may be captioned only with the case number and "Gardner vs. Venes, et al."

Dated this 13th day of June, 1951.

/s/ THOMAS S. TOBIN,
Attorney for Appellant.

[Endorsed]: Filed June 14, 1951. [133]

[Title of District Court and Cause.]

In Bankruptcy No. 44,916-Y

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

Ruth E. Spangler, being first duly sworn, on oath,

deposes and says: That she is a citizen of the United States over the age of twenty-one years, and not a party to the above-entitled matter, or interested therein.

That on the 13th day of June, 1951, she deposited a copy of Appellant's supplemental designation of parts of the record on appeal in an envelope addressed to the following:

Mr. Joseph Mayer,
Attorney at Law,
450 North Beverly Drive,
Beverly Hills, California;

and after carefully sealing said envelope so containing said copy as aforesaid, and after affixing thereon the postage required by law, she deposited said envelope in the United States Post Office at Los Angeles, California; that there is a regular communication by mail from said Post Office of deposit to the place so addressed.

/s/ RUTH E. SPANGLER.

Subscribed and Sworn to before me this 13th day of June, 1951.

[Seal] /s/ C. W. ROBINSON,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 16, 1952.

[Endorsed]: Filed June 14, 1951. [134]

In the District Court of the United States, Southern
District of California, Central Division

Civil No. 7,723-B

GEORGE GARDNER as Trustee in Bankruptcy
for the Estate of Ruth Vena Johnson, Also
Known as Ruth Boyce, Bankrupt,

Plaintiff,

vs.

GLADYS VENES, RUTH VENA JOHNSON,
Also Known as **RUTH BOYCE; FRANK**
VENES, JR., a Minor; **RUTH VENES,** a
Minor; **MARY JANE VENES,** a Minor, and
GLADYS VENES as Guardian Ad Litem for
Said Minors.

Defendants.

**AMENDED COMPLAINT TO AVOID FRAUD-
ULENT CONVEYANCES OF REAL PROP-
ERTY. BANKRUPTCY ACT SEC. 70-e.
CIVIL CODE OF CALIFORNIA SEC. 3439.-
02-04-05-06-07**

Comes Now plaintiff and pursuant to Order of
the Court and Stipulation, files his Amended Com-
plaint and complains of the defendants and alleges:

I.

That on April 24, 1947, Ruth Vena Johnson, also
known as Ruth Boyce, who will hereafter be re-
ferred to as the bankrupt or Ruth Vena Johnson,
filed her voluntary petition in bankruptcy in the
United States District Court for the Southern Dis-

trict of California, Central Division, praying she be adjudged a bankrupt within the purview of Section 4, Subdivision-a of the National [135] Bankruptcy Act; that such proceedings were had; that on April 24, 1947, she was duly adjudicated a bankrupt by said court and thereafter, on May 12, 1947, at the first meeting of creditors had and held before Honorable Benno M. Brink, one of the Referees in Bankruptcy for the District aforesaid, George Gardner, plaintiff herein, was appointed trustee, filed his bond and qualified as such trustee, and at all times since May 12, 1947, has been and now is the duly appointed, qualified and acting trustee in bankruptcy herein for the Estate of Ruth Vena Johnson, also known as Ruth Boyce.

II.

That at all times herein mentioned the bankrupt and defendant herein, Ruth Vena Johnson, was a resident and citizen of the City of Los Angeles, County of Los Angeles, and State of California, and that the plaintiff herein is likewise a resident and citizen of the City of Los Angeles, County of Los Angeles, and State of California.

III.

That at all times herein mentioned the defendants, Gladys Venes, Frank Venes, Jr., Ruth Venes, Mary Jane Venes and Judith Venes, were residents and citizens of Scotch Plains in the State of New Jersey; that the real property hereinafter

described is situated in the City of Los Angeles, County of Los Angeles and Southern District of California; that the defendants Frank Venes, Jr., Ruth Venes, Mary Jane Venes and Judith Venes, and each of them, are minors under the age of 21 years, and that during the pendency of this proceeding an Order was made by the above-entitled Court appointing their mother, the defendant, Gladys Venes, as Guardian Ad Litem for said minor defendants, and each of them. [136]

IV.

That this is an action brought under the provisions of Section 70-e of the National Bankruptcy Act, 11 U.S.C.A. Section 110-e, and the Uniform Fraudulent Conveyance Act of the State of California which was in force and effect at the time of the acts herein complained of.

V.

Plaintiff alleges that prior to December 2, 1944, the bankrupt, Ruth Vena Johnson, also known as Ruth Boyce, was the owner of certain real property situated in the City of Los Angeles, County of Los Angeles and State of California, described as:

“Lot 4 in Block 29, Tract 7555 as per Map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of Los Angeles County, State of California.”

the same having been conveyed to her on Novem-

ber 13, 1944, as her separate property by Loren W. O'Dell and Grace L. O'Dell, and said Deed recorded in the office of the County Recorder of Los Angeles County, State of California.

VI.

That theretofore on April 15, 1944, the bankrupt, who was a married woman, had entered into a property settlement agreement in writing with her husband Walter G. Johnson in contemplation of divorce proceedings which property settlement agreement provided among other things that all property thereafter acquired by either the said Walter G. Johnson or the bankrupt, his wife, should be and remain their respective separate properties, and on November 10, 1944, the said Walter G. Johnson, also known as Walter George Johnson, executed and delivered to the bankrupt a deed to the above-described real property, quitclaiming any interest he might possibly be entitled to [137] therein.

VII.

Plaintiff alleges that on December 2, 1944, the bankrupt was about to engage in business and transactions for which the property remaining in her hands after the conveyance hereinafter complained of would be an unreasonably small capital, namely, engaging in speculative real estate transactions, the operation of a so-called college for real estate brokers and salesmen and litigation with her former husband, Walter G. Johnson,

involving business transactions between them; that in connection with said business ventures the bankrupt was about to incur and did incur large indebtednesses totaling in excess of \$58,000.00, with total net assets after the conveyance herein complained of on which the trustee and creditors could realize amounting to less than \$2,000.00.

VIII.

That on December 2, 1944, while the defendants, Gladys Venes, Frank Venes, Jr., Ruth Venes, Mary Jane Venes and Judith Venes, were outside of the State of California, the bankrupt, Ruth Vena Johnson, made, executed and recorded a Deed of Gift in favor of the defendant, Gladys Venes, and her children, whereby she transferred and conveyed the real property hereinbefore described to the said defendant, Gladys Venes, and her children, as a gift; that the children meant to be named in said Deed of Gift were the defendants, Frank Venes, Jr., Ruth Venes, Mary Jane Venes and Judith Venes, the minor defendants herein; that thereafter on December 14, 1944, the bankrupt made, executed and delivered a Grant Deed to the same real property to the defendant, Gladys Venes, who is her daughter; that coincidental with the execution of said Deeds, or shortly thereafter, the bankrupt, Ruth Vena Johnson, obtained from her daughter, Gladys Venes, a general Power of Attorney running to her; that purporting to act under said general Power of Attorney, after the execution and

recordation of said Deeds of December 2, 1944, and December 14, 1944, the bankrupt and defendant, Ruth Vena Johnson, [138] proceeded to and did continuously thereafter, collect and appropriate to her own use and benefit, the rental income from said real property, amounting to the sum of \$75.00 per month and continued to manage and operate said real property the same as though it were her own.

IX.

That at the time of said transfers herein complained of, the defendant, Ruth Vena Johnson, was indebted to creditors who are creditors in her bankruptcy proceeding; that she was anticipating litigation in connection with indebtednesses which she owed prior to December 2, 1944; that subsequent to said transfer she incurred other indebtednesses and now owes creditors, some of who hold judgments against her, the sum total of approximately \$58,000.00; that the only assets realizable, so far as the plaintiff is able to ascertain, do not amount to over \$2,000.00; that the transfer of said real property had the effect of rendering the bankrupt hopelessly insolvent.

X.

That said transfer was made by the bankrupt and defendant, Ruth Vena Johnson, to the defendants, and each of them, without a fair consideration, there being no consideration whatsoever paid to said bankrupt at the time of said transfer, the purported consideration for said transfer being the fact that the bankrupt back in the year of 1918

had had about \$8,000.00 in money, consisting of currency, in a trunk in her house in Charlotte, North Carolina, which she and her then husband, Robert Starns, had accumulated and kept in said trunk, and which by verbal agreement between the bankrupt and her then husband, Robert Starns, was at some future time to be used for the education of the defendant, Gladys Venes, who was then a baby about eighteen months old; that said Robert Starns thereafter died; that said alleged sum of \$8,000.00 was never probated nor insofar as the plaintiff can ascertain, ever appeared of record in any way, shape or manner, but according to the defendant, Ruth Vena [139] Johnson, was secreted in said trunk and spent by her; that said oral agreement between the said bankrupt and her then husband, Robert Starns, was the sole consideration for the transfer of the real property herein complained of and was actually made by the bankrupt to the defendants, and each of them, without a fair consideration, and was made by the said bankrupt and accepted by the defendant, Gladys Venes, with intent to hinder, delay or defraud creditors, both present and future, as of the time of said conveyance.

XI.

That as to creditors of said bankrupt existing both before and after said transfer, and as to the plaintiff as trustee in bankruptcy for the said Ruth Vena Johnson, bankrupt, said conveyance of said real property constituted a fraud, and the plaintiff, as trustee in bankruptcy for the said Ruth

Vena Johnson, is actually the owner of said real property and entitled to possession thereof.

Wherefore, plaintiff prays judgment against the defendants as follows:

1. That the attempted conveyances of the real property hereinbefore described dated December 2, 1944, and December 14, 1944, be decreed by this court to be fraudulent and void and of no force and effect as against plaintiff herein as trustee in bankruptcy for the estate of Ruth Vena Johnson, also known as Ruth Boyce, Bankrupt, and as to creditors of the said Ruth Vena Johnson, also as Ruth Boyce.

2. That by decree of this court the deeds hereinbefore described be ordered cancelled of record and the record title in and to said real property be vested in the plaintiff as trustee in bankruptcy for the estate of Ruth Vena Johnson, also known known as Ruth Boyce.

3. That the defendant, Ruth Vena Johnson, also known as Ruth Boyce, be required to account to the plaintiff as trustee in bankruptcy for all rents, issues and profits collected from said [140] real property after the effective date of said conveyance or conveyances and used by her, and that a money judgment be rendered against the said defendant, Ruth Vena Johnson, also known as Ruth Boyce, in favor of the plaintiff herein for such amount or amounts as may be determined by this court to have been so used by said Ruth Vena Johnson, also known as Ruth Boyce.

4. That the plaintiff have and recover his costs and disbursements herein, and that he be given such other and further relief as the court may deem just and equitable in the premises.

/s/ THOMAS S. TOBIN,
Attorney for Plaintiff.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 21, 1948. [141]

[Title of District Court and Cause.]

Civil No. 7,723-B

ANSWERS OF THE DEFENDANTS TO THE
AMENDED COMPLAINT

Comes now the defendants and each of them and appears herein and answers the amended complaint on file herein and for answer, deny, admit and allege as follows, to wit:

I.

Answering paragraph VII, these defendants deny that on December 5, 1944, the defendant, Ruth Johnson, was about to engage in any business or any business transactions, and deny that property in her hands after the conveyance complained of in the complaint would be an unreasonably small capital and in that connection alleges that at the time of the making of the conveyance of the real property referred to in plaintiff's complaint, Ruth John-

son [144] was confined in a hospital at Los Angeles, California, and was not in business and that she had, in addition to the real property described in plaintiff's complaint at said time, in currency and in bonds of the United States of America a sum in excess of Ten Thousand (\$10,000) Dollars; that with respect to all of the balance of the allegations in paragraph VII, these defendants deny each, every and all thereof, both generally and specially.

II.

Answering paragraph IX, these defendants deny that at the time of the conveyance of the real property referred to in plaintiff's complaint, Ruth Johnson was indebted to any creditor or creditors who are creditors in her present bankruptcy proceeding; deny that she was anticipating litigation in connection with any indebtedness which she owed upon or prior to December 5, 1944; admits that she incurred indebtedness after December 5, 1944, but denies the same is the sum of Fifty-Eight Thousand (\$58,000.00) Dollars, but alleges that some of the claims filed against her in the bankruptcy proceeding are fictitious and will be contested by her successfully; denies that the transfer of the real property referred to in plaintiff's complaint had the effect of rendering her insolvent or hopelessly insolvent.

III.

Answering paragraph X of the Amended Complaint, these defendants deny that the transfer of the real property was without consideration and

was without a fair consideration and deny that the only consideration was the one recited in paragraph X of the plaintiff's Amended Complaint; deny that the conveyance of the said real property was made by Ruth Johnson and accepted by the other defendants with any intent to hinder, delay or to defraud creditors of the defendants, or any of them then existing or to exist in the future. These defendants other than herein expressly admitted, deny the allegations of paragraph X of the first Amended Complaint. [145]

IV.

Answering paragraph XI, these defendants deny each, every and all of the allegations thereof both generally and specially and deny that Ruth Johnson is actually the owner of the real property.

V.

And as a separate and distinct defense to plaintiff's first Amended Complaint and the cause of action therein sought to be set up, these defendants allege that on December 5, 1944, and on December 29, 1944, Ruth Johnson was solvent and after the conveyance made of the real property complained of in plaintiff's complaint, was still solvent and that no creditor came into being as a creditor of Ruth Johnson after December 29, 1944, extended any credit to Ruth Johnson by virtue of her ownership of the real property set forth in plaintiff's complaint and in that regard, alleges that the real property described in paragraph V of plaintiff's

complaint, stood in the name of these answering defendants other than Ruth Johnson, of record in the Office of the County Recorder of Los Angeles County, first on December 5, 1944, and again by deed dated December 29, 1944, and that said rec-ordation of said deeds was noticed to the world and to all persons who later dealt with Ruth John-son that Ruth Johnson was not the owner of said real property and was not entitled to use said real property as a basis of credit. These defendants allege that no existing creditor of Ruth Johnson ever extended any credit to her or dealt with her or entered into any agreement under which Ruth Johnson obligated herself to pay money to any existing creditor by virtue of any ownership of record or otherwise in Ruth Johnson of the real estate described in paragraph V of plaintiff's Amended Complaint.

Wherefore, these defendants, other than Ruth Johnson, pray that this court decree and determine the title to the real [146] property, the subject mat-ter of this action, is vested in these defendants and all of the defendants pray that plaintiff take noth-ing by his action and that these defendants have judgment for their respective costs herein extended and incurred.

/s/ RUPERT B. TURNBULL,

Attorney for the Defendants.

Duly verified.

[Endorsed]: Filed February 10, 1948. [147]

[Title of District Court and Cause.]

Civil No. 7,723-B

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above action coming on for hearing commencing on November 23, 1948, and having been partially tried, and having been continued from time to time until February 1, 1949, the plaintiff appearing in person and by his attorney, Thomas S. Tobin, and the defendant, Ruth Vena Johnson, also known as Ruth Boyce, appearing In Propria Persona, and the defendant, Gladys Venes, and the minor defendants, Frank Venes, Jr.; Ruth Venes, Mary Jane Venes, and Judith Venes, and Gladys Venes as guardian ad litem for said minors, together with the defendant, Ruth Vena Johnson, individually, having entered their appearance by Rupert B. Turnbull, an attorney, a member of the bar of this court, and having filed their answer to the plaintiff's amended complaint to avoid fraudulent conveyance [149] of real property under Section 70-E of the Bankruptcy Act, and the Civil Code of California, Sections 3439.02-04-05-06-07, and upon said cause being called for trial, the defendants herein having discharged Rupert B. Turnbull as their attorney, and the defendant, Ruth Vena Johnson, having stated in open court that she wished to defend in propria persona, and Rupert B. Turnbull having been discharged from further attendance at said trial, and testimony having been taken, evi-

dence and numerous exhibits received and considered by the court, together with the depositions of witnesses, and the cause having been argued by counsel for the plaintiff and by the defendant, Ruth Vena Johnson, and the cause submitted; now, on motion of Thomas S. Tobin, attorney for the plaintiff, the Court now makes and enters the following:

Findings of Fact

I.

The court finds that on April 24, 1947, Ruth Vena Johnson, also known as Ruth Boyce, one of the defendants herein, filed her voluntary petition in bankruptcy in the United States District Court, Southern District of California, Central Division, praying that she be adjudged a bankrupt within the purview of Section 4, subdivision a, of the National Bankruptcy Act. That on April 24, 1947, she was adjudicated a bankrupt by said United States District Court. That on May 12, 1947, at the first meeting of creditors had and held before the Honorable Benno M. Brink, one of the referees in bankruptcy for the district aforesaid, George Gardner, the plaintiff herein, was appointed Trustee, filed his bond and qualified as such trustee, and at all times since May 12, 1947, has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy for the Estate of Ruth Vena Johnson, also known as Ruth Boyce. [150]

II.

The court finds that at the time of the filing of said petition, the bankrupt, Ruth Vena Johnson, was a resident and citizen of the City of Los Angeles, County of Los Angeles, State of California, and that the plaintiff is likewise a resident and citizen of the City of Los Angeles, County of Los Angeles, State of California.

III.

The court finds that the defendant, Ruth Vena Johnson, is not a member of the bar of the District Court of the United States, but is and was engaged in the business of a real estate broker and in the operation of a real estate school.

IV.

The court finds that all times mentioned in the amended complaint of the plaintiff, the defendants, Gladys Venes, Frank Venes, Jr.; Ruth Venes, Mary Jane Venes and Judith Venes were residents and citizens of Scotch Plains in the State of New Jersey. That the real property hereinafter described is situated in the City of Los Angeles, County of Los Angeles, and Southern District of California. That the defendants, Frank Venes, Jr.; Ruth Venes, Mary Jane Venes and Judith Venes, and each of them, are minors under the age of 21 years, and that during the pendency of this proceeding an order was made by this court appointing the defendant, Gladys Venes, as Guardian ad litem for said minors, and each of them.

V.

The court finds that at the time of the trial of the above-entitled action, none of the defendants, except the defendant, Ruth Vena Johnson, appeared in court or offered any evidence on their behalf.

VI.

The court finds that prior to December 2, 1944, the [151] defendant, Ruth Vena Johnson, also known as Ruth Boyce, was the owner of certain real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 4, Block 29, Tract 7555, as per Map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the Office of the County Recorder of Los Angeles County, State of California, the same having theretofore been conveyed to her as her separate property by Loren W. O'Dell and Grace L. O'Dell, which said deed was recorded in the office of the County Recorder of Los Angeles County, State of California.

VII.

The court finds that theretofore, on April 15, 1944, the bankrupt was a married woman; that she had entered into a property settlement agreement in writing with her husband, Walter G. Johnson, in contemplation of a divorce proceeding, which property settlement agreement provided, among other things, that all property acquired thereafter by either of the said Walter G. Johnson or Ruth Vena Johnson, his wife, should be and remain their re-

spective separate properties. That on November 10, 1944, the said Walter G. Johnson, also known as Walter George Johnson, executed and delivered to the defendant a deed to the above-described real property, quit-claiming any interest he might have or be entitled to therein.

VIII.

The court finds that on December 2, 1944, the bankrupt was indebted to one, Harry V. Mooney, of San Francisco, California, in the sum of \$10,000.00 or more. That approximately sixty days thereafter suit was instituted against her in the Superior Court of the State of California in and for the County of San Francisco, by the said Harry V. Mooney, and a judgment obtained after a contested trial by the said Harry V. Mooney against the bankrupt defendant, Ruth Vena Johnson, in the sum of Ten Thousand (\$10,000.00) Dollars, together with interest and costs. [152]

IX.

The court finds that on December 2, 1944, while the defendants, Gladys Venes, Frank Venes, Jr.; Ruth Venes, Mary Jane Venes and Judith Venes, were outside of the State of California and living in Scotch Plains, New Jersey, the defendant, Ruth Vena Johnson, for the purpose of hindering, delaying or defrauding her creditors, and particularly the creditor, Harry V. Mooney, made, executed and recorded in the Office of the County Recorder of

Los Angeles County, State of California, a Deed of Gift, whereby she purported to convey in consideration of love and affection to the defendant, Gladys Venes and her children, without naming them, the real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 4, Block 29, Tract 7555, as per Map recorded in Book 88, Pages 79 to 84, inclusive, of Maps, in the Office of the County Recorder of Los Angeles County, State of California. That said consideration of love and affection recited in said Deed of Gift was not fair consideration. That no fair consideration was paid or given to the bankrupt defendant, Ruth Vena Johnson, for said property by the defendant, Gladys Venes, or any of the minor defendants. That thereafter on December 14, 1944, the bankrupt defendant, Ruth Vena Johnson, made, executed and delivered another deed purporting to be a Grant Deed to the same real property to her daughter, the defendant, Gladys Venes, and obtained back from her daughter, Gladys Venes, a general Power of Attorney, permitting her to manage, to live in, and to collect the income from said real property for her own use and benefit. That said purported conveyances, and each of them, were made by the bankrupt defendant, Ruth Vena Johnson, voluntarily and for the purpose of hindering, delaying and defrauding her creditors, and particularly the creditor, Harry V. Mooney.

X.

That at the time of the bankruptcy the bankrupt,

Ruth [153] Vena Johnson, was indebted to numerous creditors in a sum approximating \$58,000.00; that the assets in the possession of the trustee, plaintiff herein, are grossly insufficient to pay the bankrupt defendant's liabilities in full.

XI.

The court finds that any other property owned by the bankrupt in an amount sufficient to pay the judgment obtained by the creditor, Harry V. Mooney, was concealed by the bankrupt either on her person or in the name of a corporation. That the bankrupt did not intend to pay the judgment or claim of the said Harry V. Mooney; that the same has not been paid and constitutes a claim in the bankruptcy administration of the estate of Ruth Vena Johnson, bankrupt, in this court.

XII.

The court finds that said transfers, and each of them, were made without a fair consideration, and that said transfers were accepted by the defendant, Gladys Venes, without the payment by her of any fair consideration, either on her own behalf, or on behalf of the minor defendants; and that said transfers constituted a fraud against both existing and future creditors of the said Ruth Vena Johnson, bankrupt defendant.

XIII.

The court finds that after said transfer, the defendant, Ruth Vena Johnson, collected and used the income from said property, partly for the mainte-

nance thereof, and partly for her own use and benefit, but that it would not be equitable to render judgment against her for the income after avoiding said transfers.

XIV.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of [154] Law:

Conclusions of Law

I.

That this court has jurisdiction of the persons of the defendants and of the subject matter of this action, and over the real property hereinbefore described.

II.

That the real property situated in the County of Los Angeles, State of California, and Southern District thereof, described as Lot 4, Block 29, Tract 7555, as per Map recorded in Book 88, pages 79 to 84, inclusive, of Maps, in the office of the County Recorder of Los Angeles County, State of California, constitutes property transferred by the bankrupt in fraud of her creditors, and property which prior to the filing of the petition might have been levied upon and sold under judicial process against her or otherwise seized, impounded or sequestered, and under the provisions of Section 70-A of the National Bankruptcy Act was vested by operation of law in the plaintiff, George Gardner, as Trustee in Bankruptcy of the estate of Ruth Vena Johnson, bankrupt.

III.

That the transfers attempted to be made by the bankrupt defendant, Ruth Vena Johnson, on December 2, 1944, and December 14, 1944, to the defendants herein, and each of them, are fraudulent and void and of no force and effect as against the plaintiff as trustee in bankruptcy for the estate of Ruth Vena Johnson, bankrupt, and as to the creditors of the said Ruth Vena Johnson, bankrupt defendant, under the provisions of Section 70-E of the National Bankruptcy Act, and Sections 3439.02, 3439.03, 3439.04 and 3439.07 of the Civil Code of California; and that the deeds executed to said real property on December 2, 1944, and December 14, 1944, by the defendant bankrupt, Ruth Vena Johnson, to and for the benefit of the other defendants named herein, should be cancelled of record, and the record title to said real property vested in the plaintiff, as trustee in bankruptcy for the estate of Ruth Vena Johnson, also [155] known as Ruth Boyce, and administered in her bankrupt estate.

IV.

That the prayer of the plaintiff's petition for an accounting for rents, issues and proceeds collected from said real property by the defendant, Ruth Vena Johnson, after the effective date of said conveyance and used by her should be denied and no judgment rendered against her, the said Ruth Vena Johnson, except for costs.

Let judgment be entered accordingly.

Dated at Los Angeles in the Southern District of California, this 10th day of February, 1949.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged February 4, 1949.

[Endorsed]: Filed February 10, 1949. [156]

In the District Court of the United States, Southern District of California, Central Division
Civil No. 7,723—WM

GEORGE GARDNER, as Trustee in Bankruptcy
for the Estate of RUTH VENA JOHNSON,
Also Known as RUTH BOYCE, Bankrupt,
Plaintiff,

vs.

GLADYS VENES, RUTH VENA JOHNSON,
Also Known as RUTH BOYCE, FRANK
VENES, JR., a Minor; RUTH VENES, a
Minor; MARY JANE VENES, a Minor, and
GLADYS VENES, as Guardian Ad Litem for
Said Minors,

Defendants.

JUDGMENT

The above-entitled action coming on for hearing before the undersigned judge of the above-entitled court on November 23, 1948, the plaintiff appear-

ing in person and by his attorney, Thomas S. Tobin, and the defendants having appeared and answered through their attorney, Rupert B. Turnbull, and an order having been made pursuant to a stipulation that Rupert B. Turnbull, attorney, entered his appearance as attorney for Frank Venes, Jr., Ruth Venes, Mary Jane Venes and Judith Venes, minors, and consented that an order may be entered appointing their mother, Gladys Venes, as Guardian ad litem for them, and each of them, for the purpose of this litigation, and that the plaintiff might file an amended complaint including the minor defendants hereinbefore named; and [158] said amended complaint having been filed, and at the time of the trial of the above-entitled action, Rupert B. Turnbull having been discharged as attorney for all of the defendants; and the defendant, Ruth Vena Johnson, having appeared and conducted her case in propria persona, and the remainder of the defendants not appearing at the trial thereof or offering any evidence, and the cause having been argued, and the court having made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises; now, on motion of Thomas S. Tobin, attorney for the plaintiff, it is,

Ordered, Adjudged and Decreed that the purported transfers attempted by the defendant, Ruth Vena Johnson, of the real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 4, Block 29, Tract 7555, as per Map, recorded in Book 88, pages 79 to

84, inclusive, of Maps, in the office of the County Recorder of Los Angeles County, State of California, pretended to be made on December 2, 1944, and December 14, 1944, are fraudulent and void as to creditors of the defendant, Ruth Vena Johnson, and as to George Gardner, her Trustee in Bankruptcy, plaintiff herein, and that said conveyances, and each of them, should be cancelled of record, annulled and set aside.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, George Gardner, as Trustee in Bankruptcy for the Estate of Ruth Vena Johnson, also known as Ruth Boyce, is the owner of and entitled to immediate possession of said real property.

It Is Further Ordered, Adjudged and Decreed that the defendants, Gladys Venes, Frank Venes, Jr., Ruth Venes, Mary Jane Venes and Judith Venes, and their guardian ad litem, Gladys Venes, have no right, title, interest, lien or claim in and to said real property.

It Is Further Ordered, Adjudged and Decreed that the plaintiff have and recover his costs and disbursements herein, to [159] be taxed and allowed according to law.

It Is Further Ordered, Adjudged and Decreed that no accounting for the rents, issues and proceeds of said real property be required of the defendants herein.

Done at Los Angeles in the Southern District of

California, this 10th day of February, 1949, at 12:50 p.m.

/s/ WM. C. MATHES,

United States District Judge.

Lodged February 4, 1949.

[Endorsed]: Filed February 10, 1949. [160]

MANDATE

United States of America—ss.

The President of the United States of America

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division Greeting:

Whereas, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in a cause between George Gardner, as Trustee in Bankruptcy for the Estate of Ruth Vena Johnson, also known as Ruth Boyce, bankrupt, plaintiff, and Gladys Venes, Ruth Vena Johnson, also known as Ruth Boyce; Frank Venes, Jr., a minor; Ruth Venes, a minor; Mary Jane Venes, a minor, and Gladys Venes, as Guardian ad litem for said minors, defendants, No. 7723-WM, a judgment was duly filed and entered on the 10th day of February, 1949, which said judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said Ruth Vena Johnson, et al.,

appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 10th day of November, in the year of our Lord, one thousand nine hundred and forty-nine, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(December 28, 1949.) [161]

You, Therefore, are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the seventeenth day of April in the year of our Lord one thousand nine hundred and fifty.

[Seal]

PAUL P. O'BRIEN,

Clerk, United States Court of Appeals for the
Ninth Circuit.

[Endorsed]: Filed April 19, 1950. [162]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 162, inclusive, contain the original Debtor's Petition and Schedules in Bankruptcy; Orders of Adjudication and of General Reference; Bond of Trustee and Order Approving; Referee's Certificate on Petitions for Review of Order Quieting Title to Real Property and fifteen documents certified therewith by the Referee; Supplement to Referee's Certificate on Petitions for Review of Order Quieting Title to Real Property; Opinion on Petition for Review; Findings of Fact and Conclusions of Law and Order Reversing Referee's Order; Notice of Appeal; Points on Which Appellant Intends to Rely on Appeal; Designation of Parts of the Record on Appeal; Affidavit of Service; Supplemental Designation of Parts of the Record on Appeal; Amended Complaint to Avoid Fraudulent Conveyances of Real Property in Case No. 7723-B; Answers of the Defendants to the Amended Complaint in Case No. 7723-B; Findings of Fact and Conclusions of Law in Case No. 7723-B; Judgment in Case No. 7723-WM; Mandate in Case No. 7723-WM which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12 day of July, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13009. United States Court of Appeals for the Ninth Circuit. George Gardner, as Trustee in bankruptcy for the estate of Ruth Vena Johnson, also known as Ruth Boyce, bankrupt, Appellant, vs. Ruth Vena Johnson, also known as Ruth Boyce, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 13, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13009

POINTS ON WHICH APPELLANT INTENDS
TO RELY AND DESIGNATION OF PARTS
OF THE RECORD TO BE PRINTED

To Paul P. O'Brien, Clerk of the Above-Named
Court:

The undersigned attorney for the appellant hereby adopts in this Court as points on which appellant intends to rely on appeal, the points on which appellant intends to rely on appeal in the District Court, Clerk's Record, pages 126 and 128, the same as though separately designated in this Court.

Designation of Parts of the Record To Be Printed

The undersigned attorney for the appellant hereby designates the parts of the record certified up by the Clerk of the District Court of the United States for the Southern District of California, as being the parts of the record to be printed on appeal in this Court, there being some portions of the Clerk's record not material on appeal in this proceeding and duplications.

1. Voluntary petition—Pg. 2*.

Please print caption in the voluntary petition but in all subsequent proceedings in the bankruptcy proceeding of Ruth Vena Johnson, omit the formal

*District Court Clerk's Record.

caption, merely designating it by number and "title of court and cause."

2. Summary of debts and assets—Pg. 3.

3. Schedule B-1, bankrupt's schedules in bankruptcy, Real Estate—Pg. 27.

4. Schedule B-4, Property in Reversion, Remainder, Trust and Expectancy—Pg. 32.

5. Schedule B-5, Property Claimed Exempt—Pg. 33.

6. Schedule B-6, Books, Deeds and Papers, also including oath to Schedule B—Pg. 34.

7. Orders of adjudication and special reference—Pg. 35.

8. Trustee's bond and approval thereof—Pg. 36.

9. Referee's certificate on petitions for review of order quieting title to real property—Pg. 37-43, incl.

10. Petition for order to show cause quieting title to real property—Pg. 44-51, incl.

11. Order to show cause—Pg. 52 to 56, incl.

12. Order authorizing service of process by private citizen—Pg. 57.

13. Affidavit of service on Walter G. Johnson and Ruth Vena Johnson—Pg. 61 and 62.

14. Application for extension of time to file answer, etc.—Pg. 63-66, incl.

15. Order continuing hearing on order to show cause in re certain real property—Pg. 67.

16. Homestead exemption claim—Pg. 68.

17. Order quieting title to real property—Pg. 70-77, incl.

18. Petition for order extending time to file petition for review—Pg. 78.

19. Order extending time within which to file petition for review of order quieting title to real property—Pg. 80.

20. Petition for review, including verification by bankrupt, Ruth Vena Johnson—Pg. 96-99, incl.

21. Supplement to Referee's certificate on petitions for review, etc. (Omit photostats of parts of schedules as they would duplicate parts of the schedules already designated in Nos. 3 to 6—Pg. 100-101, incl.

22. Opinion on petition for review—Pg. 103-114, incl.

23. Findings of fact and conclusions of law and Order reversing Referee's order—Pg. 115-124, incl.

24. Notice of appeal—Pg. 125.

25. Points on which appellant intends to rely on appeal—Pg. 126-128, incl.

26. Designation of parts of the record on appeal (District Court)—Pg. 129-130, incl.

27. Affidavit of service—Pg. 131.

28. Appellant's supplementary designation of parts of record on appeal—Pg. 132-133.

29. Affidavit of service by mail—Pg. 134.

30. Civil No. 7723-B, Amended complaint to avoid fraudulent conveyance of real property—Pg. 135-142, incl.

Please print the title of this case but omit the title in all subsequent proceedings therein simply setting out "title of court and cause."

31. Answers of defendants to amended complaint action No. 7723-B—Pg. 144-148, incl.
32. Findings of fact and conclusions of law action No. 7723-B—Pg. 149-156, incl.
33. Judgment, No. 7723-WM—Pg. 158-160.
34. Mandate of Court of Appeals, including filing stamp—Pg. 161-162, incl.
35. Certificate of Clerk of United States District Court.
36. This document.

Dated: July 10, 1951.

/s/ THOMAS S. TOBIN,
Attorney for Appellant.

[Endorsed]: Filed July 13, 1951.

100-1000

No. 13009.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of

RUTH VENA JOHNSON,

Bankrupt.

GEORGE GARDNER, as Trustee in Bankruptcy for the Estate
of Ruth Vena Johnson,

Appellant,

vs.

RUTH VENA JOHNSON,

Appellee.

APPELLANT'S BRIEF.

THOMAS S. TOBIN,

111 West 7th Street,

Los Angeles 14, California,

Attorney for Trustee and Appellant.



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No. 13009.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of

RUTH VENA JOHNSON,

Bankrupt.

GEORGE GARDNER, as Trustee in Bankruptcy for the Estate
of Ruth Vena Johnson,

Appellant,

vs.

RUTH VENA JOHNSON,

Appellee.

APPELLANT'S BRIEF.

This is an appeal from an order of the District Court of the United States for the Southern District of California, Honorable Leon R. Yankwich, Judge, reversing an order made by Referee in Bankruptcy, Benno M. Brink, which quieted title to certain real property described therein in favor of the Trustee and against the fraudulent bankrupt, Ruth Vena Johnson, and which order of the District Judge decreed that this fraudulent bankrupt was entitled to a homestead allowance of \$7,500.00 out of property recovered by the Trustee which had been concealed by the bankrupt after the fraudulent conveyance.

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by the bankrupt under Section 2, Subdivision 1 of the National Bankruptcy Act by the filing of her voluntary petition in bankruptcy praying for adjudication under the provisions of Section 4-a of the National Bankruptcy Act, and under which the bankrupt was adjudicated. The jurisdiction of this Court is invoked under the provisions of Section 24-a of the National Bankruptcy Act. The jurisdiction of the District Court in the proceeding in *Gardner, Trustee v. Venes, et al.*, which will be later referred to, and in which the fraudulent conveyance by the bankrupt of her property was avoided, was invoked under the provisions of Section 70-e of the National Bankruptcy Act. (11 U. S. C. A., Sec. 110E.)

The summary jurisdiction of the Referee to quiet title to the real property in question, in the possession of the Trustee, was likewise invoked under Section 70-e of the National Bankruptcy Act, and the jurisdiction of the District Court on review was invoked by the bankrupt under Section 39-c of the National Bankruptcy Act.

Statement of the Case.

Ruth Vena Johnson, the bankrupt herein, filed her voluntary petition in the United States District Court for the Southern District of California on April 24, 1947, and was adjudicated a bankrupt under said petition. [Tr. pp. 3 and 9.] In her voluntary petition under Schedule B-1, she scheduled real estate "none." Under Schedule B-5, "Property claimed to be exempt under Federal and State Laws," she likewise scheduled "none." Under Schedule B-4, "Property in Reversion, Remainder or Expectancy, including property held in trust for the debtor

or subject to any power or right to dispose of or to charge" she likewise scheduled "none." [Tr. pp. 5 and 6.] George Gardner, appellant herein, was appointed Trustee at her First Meeting of Creditors, filed his bond and qualified as Trustee. [Tr. pp. 10 to 12.] In the course of the administration of the bankrupt estate it was discovered that the bankrupt had formerly owned a piece of property on Drexel Avenue, on which she was then living. Investigation of the public records disclosed that she had made a transfer of it to her daughter, Gladys Venes, and her children, without naming them, the consideration being love and affection. After due investigation, the Trustee instituted an action in the United States District Court for the Southern District of California, Central Division, seeking to set the transfer aside as fraudulent, it being the Trustee's contention that the transfer was made by the bankrupt with the intent to hinder, delay or defraud her creditors, and particularly one Harry V. Mooney at San Francisco, who had later obtained a judgment against her in a sum in excess of \$10,000.00.

This action attacked not only the transfer made to Gladys Venes and her children, but also another absolute deed executed by the bankrupt to Gladys Venes alone, dated December 14, 1944. *The bankrupt was a party defendant in this action.* She employed Rupert B. Turnbull as defense attorney, a stipulation was entered into for the appointment of a guardian *ad litem* for the minor children named in the first deed attacked, an amended complaint was filed [Tr. p. 92], and answered by all defendants, *including the bankrupt*, and the issues joined. [Tr. pp. 100 to 103.] Nowhere in the answer to the amended complaint, either as an affirmative defense, or otherwise, was the homestead declaration, in controversy

here, ever mentioned or hinted at. [See answer of defendants to amended complaint, Tr. pp. 100 to 103], duly verified. [Tr. p. 103.]

The case was tried before Honorable William C. Mathes, United States District Judge, on the amended complaint and the answer thereto. The morning of the opening of the trial, the bankrupt discharged Attorney Rupert B. Turnbull in open court and announced that she, a real estate broker, was going to try her own case, which she did. The trial resulted in Judge Mathes making findings of fact, conclusions of law and a decree that the property in question had been transferred by the bankrupt voluntarily and for the purpose of hindering, delaying and defrauding her creditors, and particularly the creditor Harry V. Mooney; that at the date of bankruptcy she was indebted to numerous creditors in a sum approximating \$58,000.00, and that any other property owned by the bankrupt in an amount sufficient to pay the judgment obtained by the creditor, Harry V. Mooney, was concealed by the bankrupt either on her person or in the name of a corporation, and that the bankrupt did not intend to pay the judgment or claim of Harry V. Mooney, and that the same constituted a claim in the bankruptcy administration of Ruth Vena Johnson in the District Court. The Court concluded that said purported transfers should be cancelled of record and the record title vested in the plaintiff Gardner, as Trustee, the same to be administered in her bankrupt estate. [See Findings of Fact and Conclusions of Law, Tr. pp. 104 *et seq.*] Judge Mathes entered a judgment on February 10, 1949, decreeing that the plaintiff, George Gardner, as Trustee in bankruptcy for the Ruth Vena Johnson estate, was the owner of and entitled to immediate posses-

sion of said real property. [See Judgment, Civil No. 7723-WM, Tr. p. 113.]

The bankrupt took an appeal from this judgment to this Court on behalf of herself and the other defendants, being represented by Attorney Morris Lavine. The matter was argued and the judgment of the District Court was affirmed. (See *Johnson, et al. v. Gardner*, 179 F. 2d 114.) The bankrupt then applied to the Supreme Court of the United States for a writ of certiorari which was denied on April 10, 1950. The mandate of this Court then came down and was spread on the records of the District Court. [Tr. pp. 116-117.] The Trustee prepared to sell the property in the course of administration of the bankrupt estate and discovered, upon a title report coming down, that the title to the property was badly clouded, Ruth Vena Johnson appearing on the abstract of title under some eighteen different aliases under which she had operated [Tr. pp. 30-31], and for the first time the declaration of homestead which the bankrupt had filed back in 1944 came to our attention. The Trustee, being in actual possession of the property in question, instituted a summary proceeding before Referee Benno M. Brink against all persons, firms and corporations, including the bankrupt, who in one way or another had clouded the title to the property. [See petition for order to show cause quieting title to real property and order to show cause issued thereunder, Tr. pp. 21 to 34.] The order to show cause was issued, hearing set thereon, and the bankrupt, who is serving a term in the Women's

Prison at Tehachapi [see *People v. Boyce*, 99 Cal. App. 2d 439, and Finding No. VI in the Court below, Tr. pp. 75-76], filed an answer setting out her demand for the allowance of the homestead exemption in this recovered property. [Tr. pp. 40 to 44.]

A hearing was had on the order to show cause, and by reason of the fact that the property involved was property which had been fraudulently transferred and concealed by the bankrupt and which had been recovered by the Trustee for the benefit of the estate, Referee Brink, following the 1938 amendment to Section 6 of the National Bankruptcy Act, denied her claim to a homestead exemption therein. The bankrupt then took a review, not only from this order, but from a previous order of Referee Brink denying her discharge in bankruptcy (which we believe may come before this Court at the same time as this appeal), and the two reviews were heard before Judge Yankwich at different dates. Judge Yankwich affirmed the order of the Referee denying the bankrupt's discharge, and at a later date reversed the order of the Referee quieting title and directed that the bankrupt be allowed a homestead exemption in the amount of \$7,500.00 out of this concealed property.

From that order the Trustee has taken an appeal and we are informed that the bankrupt is planning on taking an appeal from the order affirming the denial of her discharge. We shall probably discuss both of these appeals in the same brief for convenience not only of the Court but of ourselves.

Specifications of Error.

Specification I.

The District Judge erred in reversing the order of Referee Benno M. Brink, quieting title to the real property in controversy as against the bankrupt.

Specification II.

The District Judge erred in refusing to affirm the order of the Referee quieting title to the real property in controversy in favor of the Trustee and against the bankrupt, and denying the bankrupt a homestead exemption therein.

Specification III.

The District Judge erred in concluding that the 1938 amendment to Section 6 of the National Bankruptcy Act does not stand in the way of recognizing the homestead rights of the bankrupt in and to said real property.

Specification IV.

The District Judge erred in allowing the bankrupt a homestead exemption of \$7,500.00 in said real property based on a declaration of homestead recorded on November 18, 1944, at a time when the State law of California permitted a homestead exemption to the head of a family in the sum of only \$5,000.00, there being no evidence that any subsequent declaration of homestead was filed by the bankrupt, or that she was the head of a family.

Specification V.

The District Judge erred in holding that the bankrupt was entitled to exemptions out of property which she had transferred or concealed and which had been recovered, and the transfer of which was avoided under this Act for the benefit of the estate, in direct contravention

of the provisions of Section 6 of the National Bankruptcy Act as amended in 1938.

Specification VI.

The District Judge erred in ignoring the decree of Judge William C. Mathes of the United States District Court for the Southern District of California, Central Division, entered February 10, 1949, avoiding the fraudulent conveyance by the bankrupt of this property, which decree had been affirmed by this Court, petition for writ of certiorari denied by the Supreme Court of the United States, and in which the mandate of this Court was on file, and which proceedings were in evidence in the above entitled matter by reference, including pleadings, findings of fact, conclusions of law, decree and mandate.

Specification VII.

The District Judge erred in concluding that the declaration of homestead filed by the bankrupt on November 18, 1944, was not affected by the bankrupt's attempts to deed the property to her daughter, and that the setting aside of the fraudulent conveyance left the property in the same status as it had been before the deed was executed subject to the burden of the homestead, and in concluding that her attempted conveyance to her daughter did not operate as an abandonment of her homestead under the provisions of Section 1243 of the California Civil Code.

Specification VIII.

The District Judge erred in not concluding that the bankrupt was estopped from claiming any exemption in said property by virtue of the judgment of Judge William C. Mathes of February 10, 1949, decreeing that the Trustee was the owner of said property, in an action in which the bankrupt was a party and was appellant in this Court, and which decree had long since become final.

ARGUMENT, POINTS AND AUTHORITIES.

Specification Nos. I and II.

These two specifications can be argued together as they really mean the same thing, namely, that the District Judge erred in reversing the Referee's order and in refusing to affirm the same. It would naturally follow that if the District Judge erred in any respect on the law, that these two specifications of error should be sustained and the order of the District Court reversed. Hence, we will devote no extensive argument to the first two specifications of error but will rely on the result that must inevitably follow if any of the other specifications are sustained.

Specification No. III.

The District Judge erred in concluding that the 1938 amendment to Section 6 of the National Bankruptcy Act does not stand in the way of recognizing the homestead rights of the bankrupt in and to said real property. [Judge's Conclusion of Law No. II, Tr. p. 77.]

Prior to the 1938 amendment to Section 6 of the Bankruptcy Act, many inequities resulted. Bankrupts were able to fraudulently transfer and conceal property from their trustees, and when the fraudulent transfer or concealment was discovered and the Trustee had successfully sued the fraudulent transferee, or had obtained a turnover order against the bankrupt for the concealed property, the bankrupt would then frequently come in and amend his schedules to claim an exemption out of the loot recovered by the trustee for the benefit of the bankrupt estate. It is too well known to require discussion, that a debtor cannot avoid his fraudulent conveyance and recover the fraudulently conveyed property back for himself, but that credi-

tors or their successor in interest, such as a trustee in bankruptcy, may do so. (Bankruptcy Act, Sec. 70E, 11 U. S. C. A., Sec. 110E.) The result was that the trustee could pull a fraudulent bankrupt's chestnuts out of the fire at the expense of the estate, using Sections 67 or 70 of the National Bankruptcy Act as a weapon and the bankrupt would then be permitted to profit by his own wrong in the form of an exemption out of the recovery. The courts throughout the country were sharply divided on the question, some District Courts holding that an exemption should be allowed therefrom and others holding to the contrary.

In the *Matter of White*, 109 Fed. 635, the Court said:

"The law would be a mockery, to permit a party to take advantage of his own wrong, if after having transferred his property in fraud of the bankrupt act, and compelling the trustee in bankruptcy, at the expense of the estate, to engage in protracted litigation, to uncover his fraud and recover the proceeds of the property from the wrongtakers, the bankrupt could stand quietly by, and then come in and make his selection of \$300 in money out of the fruits of the litigation necessitated by his wrong and fraud. He is within neither the letter nor the spirit of the law."

Another case involving denial of a bankrupt to exemptions out of property preferentially transferred and recovered by the Trustee, was *In re Coddington*, 126 Fed. 891, in which the Court stated:

"In view of this, it would produce a most peculiar and anomalous result if at this stage, the bankrupt could step in and assert his exemption to that which

had been recovered, and thus defeat the very object for which a right of recovery is given by the act."

Other cases along the same line are:

In re Wishnefsky, 181 Fed. 896;

In re Long, 116 Fed. 113;

In re Evans, 116 Fed. 909.

With this division of authority in mind, Congress then proceeded to amend the Act in 1938 to abate this evil. It added to Section 6 of the National Bankruptcy Act pertaining to exemptions, the following:

"*Provided, however*, that no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate * * *."

Commenting on this amendment, Collier on Bankruptcy, 14th Edition, Volume 1, at page 840, makes the following comments:

"Under the terms of the Act of 1938, the conflict has been stilled. * * * It is clear, therefore, that whenever the trustee recovers property transferred or concealed by the bankrupt, or where any transfer can be avoided under the terms of the Act, the bankrupt will not be allowed to come in and amend his schedules and claim exemptions out of that particular property, save in the situation within the 'except' clause."

See also:

Matter of Rogers, 45 Fed. Supp. 297.

In the case at bar, there was no contention that the bankrupt transferred this property to her daughter or her daughter and her grandchildren as *security*. The defendants in the fraudulent conveyance action before Judge Mathes defended on the sole ground that the transfer was made in good faith, for a valuable and fair consideration, and that the bankrupt had no interest in the property and that Gladys Venes, her daughter, and her grandchildren were the owners thereof. [Tr. pp. 101 to 103.] Judge Mathes, unfortunately for them, found differently, annulled the transfers and vested the Trustee with title to this property. [Tr. p. 115.]

We are not confronted with a situation where, during the extensive litigation before Judges Mathes, the bankrupt had amended her answer and set up that she had theretofore filed a declaration of homestead against this property and that the conveyance was not fraudulent. On the contrary she maintained throughout, that the property *did not belong to her* [Tr. p. 102], that she had no interest in it, and not only did Judge Mathes disagree, but this Court and the Supreme Court of the United States sustained him. Consequently, the property in question, from the moment Judge Mathes' judgment became final, constituted property "which is recovered or the transfer of which is avoided under this Act for the benefit of the estate," and title to which was vested in the Trustee by Judge Mathes' final decree. [Tr. p. 115.]

We respectfully submit that the amendment of 1938 means exactly what it says in plain English, namely, that a fraudulent bankrupt cannot be allowed exemptions out of fraudulently transferred or concealed property, where he has not laid his cards on the table in his schedules

and disclosed the transaction. Collier, further discussing this amendment, says:

“It was thought by the framers of the Act that ‘a bankrupt should not profit at the expense of the creditors from the efforts of the trustee in undoing the bankrupt’s own acts.’ See Analysis of H. R. 12,889, 7th Cong., 2d Sess. (1936) 28, * * * See also statement by Mr. Watson B. Adair, member of the National Bankruptcy Congress, in House Hearings on H. R. 6439, 75th Cong. 1st Sess. (1937) 29.”

At this point, it might be well to discuss Specification of Error No. VIII as it is closely related to Specification No. III.

Specification No. VIII states that:

“The District Judge erred in not concluding that the bankrupt was estopped from claiming any exemption in said property by virtue of the decree of Judge William C. Mathes of February 10, 1949, decreeing that the trustee was the owner of said property, in an action to which the bankrupt was a party and was appellant in this court, and which decree had long since become final.”

The Trustee, in seeking to undo the mischief, joined all of the parties to the fraudulent conveyance in the action of *Gardner v. Venes*, No. 7723 WM, among these defendants being the bankrupt, asking that the fraudulent transfer be avoided and the bankrupt be required to account to the Trustee for the rents, issues and profits collected by her during the period of the fraudulent conveyance. The bankrupt, Ruth Vena Johnson, appellee here, was a direct party defendant in that suit and took full

charge of the management and control of the defense thereof as appears from the statement of facts set forth in the opinion of Judge McCormick in *Johnson, et al. v. Gardner*, 179 F. 2d 114. [See also, Tr. pp. 104-105.] The decree in that case was explicit and was in evidence by reference in the proceedings before Referee Brink. [Tr. p. 20.] This decree expressly finds that the appellant here is the owner of and entitled to immediate possession of said real property. [Tr. p. 115.] The decree in question had long since become final, with the stamp of approval both of this Court and of the Supreme Court of the United States thereon. [Tr. p. 116.]

This decree was pleaded in allegation No. IV of the Trustee's petition for order to show cause quieting title to real property and every element of *res judicata* is set forth therein. [Tr. pp. 22-23.] The decree of Judge Mathes was recognized as final and *res judicata* in the Referee's finding of fact No. I [Tr. pp. 48 to 49], and in his conclusion of law No. III. [Tr. of Record, p. 52.]

It is well settled, not only in Federal courts but in the courts of every State in the Union, that where litigation is terminated in a court of competent jurisdiction involving identity of parties, and identity of issues, especially involving title to real property, the final decree of that court of competent jurisdiction is conclusive and final, and none of the defendants nor their privies can thereafter litigate the issues over again under another guise, if those issues could have been determined in the original proceeding.

See:

Sampsell v. Gittelman, 55 Cal. App. 2d 208 at 214;
Fisher v. Medwedeff, 184 Md. 167, 40 A. 2d 360.

Now let us for a moment analyze the situation here. It is true that Judge Yankwich, in reversing Referee Brink, has proceeded on the theory that the bankrupt could not fraudulently transfer her homestead exemption insofar as creditors were concerned. However, conceding for the sake of argument that this might be true, Ruth Vena Johnson was a party defendant in the action before Judge Mathes. She denied that she had made a fraudulent conveyance of the property in question. She made no mention in her answer of any homestead declaration thereon but prayed that the Court decree and determine the title of the real property to be vested in the defendants Venes, and that the plaintiff take nothing by his action. Had she and her privies, fraudulent transferees, desired to rely on the homestead declaration filed in 1944, this defense should have been pleaded and advanced, especially in view of the provisions of Section 1243 of the Civil Code of California, which reads as follows:

“A homestead can be abandoned only by a declaration of abandonment *or a grant thereof* executed and acknowledged * * * (2) by the claimant if unmarried.” (Italics ours.)

This was not done and the bankrupt consistently maintained that the property in question was her daughter's and that *she had no interest at all therein*. Then after the Trustee had battled her and her co-defendants clear to the United States Supreme Court, for the first time, long after the decree in that action had become final, we find another District Judge holding that notwithstanding Judge Mathes' final decree, holding that the property in question belonged to the Trustee, the former decree of Judge Mathes was not binding. The District Judge apparently went on the theory that after we had set this

transfer aside, recovered the property and vested title in the Trustee, because, in order to sell the property, it was necessary to bring an action to quiet title and remove the clouds therefrom, and because we were compelled to join the bankrupt as one of some thirty-eight respondents in said action, we again reopened the whole controversy, and that although Judge Mathes' decree was pleaded and offered in evidence in the summary proceedings, it would avail us nothing as our muniment of title. We respectfully submit that District Judge Yankwich ran absolutely counter to all rules of law pertaining to *res judicata* and estoppel by judgment. Had the bankrupt not been a party to the litigation before Judge Mathes—and a very active party, incidentally— [Tr. p. 104] the situation might possibly be different. The fact remains, however, that she was the moving spirit in the defense camp in that litigation, ran the entire show herself, and certainly was concluded by the judgment of Judge Mathes, and we respectfully submit that Judge Yankwich erred in not giving full faith and credit to the decree of his colleague on the District Court.

It is well settled in California, and we believe in all other States and under Federal jurisdiction, that not only is a party to litigation concluded by matters therein litigated, but is also concluded by matters which might have been adjudicated therein as being germane to the issues.

“A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which

might with propriety have been litigated and determined in that action.” (34 Corpus Juris, Judgments, Section 1236.)

Citing:

United Shoe Machinery Corp. v. U. S., 258 U. S. 451;

Bates v. Bodie, 245 U. S. 520;

Troxell v. Delaware, etc. R. Co., 227 U. S. 434;

Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252;

Northern Pac. R. Co. v. Slaght, 205 U. S. 122.

And numerous other cases in practically all, if not all, of the States of the Union.

This is particularly so where title to property is involved in litigation and matters which might have been urged for or against the title or interest claimed in the property were not urged.

Ivancovich v. Weilenman, 144 Cal. 757.

In 15 Cal. Juris., Judgments, Section 206, we find the following:

“Subject to the general limitations elsewhere discussed, an adjudication of title is conclusive not only as to the matters actually urged but all those which might have been urged for or against the title or interest claimed in the property, even including a previous judgment or decree adjudicating the title.”

Citing:

Semple v. Ware, 42 Cal. 619;

Semple v. Wright, 32 Cal. 659.

In *Erving v. J. H. Goodman & Co. Bank, et al.*, 171 Cal. 559, at the conclusion of its opinion in support of the above principle, the Supreme Court of California said:

“It is the rule that where possession and damages are both sought in an action in replevin, such a suit will be regarded as a waiver of any claim which might be asserted by reason of a lease. (*Coburn v. Goodall*, 72 Cal. 498, 506.) Such an action is incompatible with any claim of right under a lease, because the damages include the detriment caused by the detention of the property from its owner. The action was between the same litigants, and the subject matter was the same property and the amount due for its detention. Such a judgment is conclusive between the parties not only upon the matters actually litigated but upon every ground of recovery. (24 Am. & Eng. Ency. of Law, 2d ed., 781; *Sullivan v. Triunfo Min. Co.*, 39 Cal. 459; *Bingham v. Kearney*, 136 Cal. 175, 177; *Flynn v. Hite*, 107 Cal. 460.

“When plaintiff brought the replevin suit he repudiated the contract of lease. His course was an election of remedies, that is, he chose to assert one of two inconsistent remedial rights, and is bound by such choice.” (Citing cases.)

The second most recent case on this subject in California is the case of *Nellis v. Guidotti*, 105 A. C. A. 10, which case cites with approval the cases of *Smith v. Schuler Knox Co.*, 85 Cal. App. 2d 96; *Scarborough v. Briggs*, 81 Cal. App. 2d 161, and *McManus v. Bendlage*, 82 Cal. 2d 916 at page 922.

See also:

Basore v. Metropolitan Trust Co., 105 A. C. A. 1006, Aug. 6, 1951.

In the case at bar, the bankrupt and her daughter were sued as joint tort feorsors. Both answered and both contested the litigation. Either or both had the alternative of setting up the defense; that the property transferred was the bankrupt's homestead, and that creditors were not concerned; or, on the other hand, setting up the defense that the transfer was for a fair and valuable consideration; that the bankrupt had completely parted with any right, title and interest in or to the property, and that Gladys Venes was the undisputed owner thereof. They chose the latter alternative, making no mention whatsoever of the homestead. It is very evident that it was the clear intention of the bankrupt to abandon her previously declared homestead thereon. (Civ. Code, Sec. 1243.)

The cases of *Vieth v. Klett*, 88 Cal. App. 2d 23, and *Palen v. Palen*, 28 Cal. App. 2d 602, apparently relied upon by the District Judge, are nowise in point. In these cases there was no intention to convey any beneficial interest to the transferee. In fact, in the case of *Vieth v. Klett*, the transfer was merely a formality, made to a third party, to be reconveyed to the transferor and his spouse in joint tenancy. In other words, the parties simply undertook to convert a tenancy in common into a joint tenancy and the vesting of the title in the third person was purely momentary. We have no such situation here.

As we have heretofore pointed out under Section 1243 of the Civil Code of California, a homestead may be abandoned by a grant thereof. The leading case on that subject, so far as we have been able to ascertain, is *Faivre v. Daley*, 93 Cal. 664. In that case, at page 668, the Supreme Court of California begins a discussion two pages long, discussing the definition of the word "grant." This

comprehensive discussion adopts the following definitions from various State court decisions and legal treatises. We shall set them out somewhat sketchily.

“The word “grant,” taken largely, is where any thing is granted or passed from one to another; and in this sense it comprehends feoffments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word without writing.’ (3 Washburn on Real Property, 5th ed., 193,375.) * * * In our statute, by the term ‘grant,’ the legislature intended all the ordinary modes of acquiring property by deed, whether operating by force of the statute of uses or not, that by long usage such had become not only the popular but also the technical meaning of the term.’ (Ross v. Adams, 28 N. J. L. 165.) In *Durant v. Ritchie*, 3 Mason 69, the court said: ‘The word “grant” is *nomen generalissimum*. It includes all sorts of conveyances.’”

Quoting from *McVey v. Green Bay etc. R. R. Co.*, 42 Wis. 536, the Supreme Court of California said:

“But the word “grant” has also a larger meaning in the law. It is said in Sheppard’s Touchstone that this word is taken largely where anything is granted, or passes from one to another. * * * Hence, in any view we can take of the question, we are impelled to the conclusion that the word “grant,” as used in the statute, includes deeds of bargain and sale.’

“It is admitted that Carleton was the owner of the property at the time the declaration of homestead was filed; and as a quitclaim deed in this state passes all the title which the grantor has (*Lawrence v. Ballou*, 37 Cal. 518), we think the deed from Carleton and wife to plaintiff was a grant, within the meaning of section 1243 of the Civil Code, which operated as

an abandonment of their homestead right, and that it conveyed to plaintiff all the interest they had in the property.”

The rule laid down in the foregoing case was followed by the District Court of Appeal for the Fourth Appellate District in *White v. Rosenthal*, 140 Cal. App. 184, and amplified to hold that a grant thereof extended even to an involuntary transfer or a transfer by operation of law. At page 186, after citing Section 1243 of the Civil Code and the case of *Faivre v. Daley*, 93 Cal. 664, the Court says:

“A transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another. (Civ. Code, sec. 1039.) The word ‘grant’ as used in Civil Code, section 1243, is applicable to all transfers of real estate and this would include transfers by operation of law as well as the voluntary transfers of the owners of property. * * *

“When the mortgagor disposes of the mortgaged premises either by his own deed or by operation of law he loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can by no subsequent act create or revive charges upon the premises. He is, as to the premises, thenceforth a mere stranger. With respect to the property placed beyond his control he has no personal privilege. He cannot at his pleasure affect the interests of other parties. (Lord v. Morris, 18 Cal. 482.)

“When the premises herein concerned were sold at foreclosure sale the owners thereof lost all control over them and the homestead thereon was as completely and effectually abandoned as though appel-

lants had disposed of their property by grant deed. The fact that appellants and the mortgagee were, during the latter part of the period of redemption, engaged in negotiations to refinance the property and contemplating a reconveyance of it to appellants, does not change the rule. No rights existing or contemplated in the transferor in and to the property survive the transfer of the property. * * *

“In order to protect their homestead rights it was necessary when they again became the owners of the property to file a new declaration of homestead. (Johnston v. Bush, 49 Cal. 198; Corey v. Matot, 47 Cal. App. 184. Apparently this requirement was recognized by appellants for they did file a new declaration on June 25, 1931. Being filed, as it was, after the sheriff had levied on the property, the second declaration of homestead could not operate to exempt the property from execution sale.”

See also

Bank of Suisun v. Stark, 106 Cal. 207.

As pointed out before, the bankrupt did not schedule this property in her sworn schedules in bankruptcy nor in any manner disclose the fact that she had conveyed this property by deed to her daughter, nor did she claim it exempt, nor for that matter has she yet amended her schedules and claimed it exempt. She has consistently stood on the basis that she was not the owner of the property but that her daughter was. Hence no attempt was made to claim it exempt until the Trustee had recovered it for her estate.

It is well settled that in order to have an exemption allowed in a bankruptcy proceeding, even independent of the 1938 amendment to Section 6 of the National Bank-

ruptcy Act, the bankrupt has been required, throughout the life of the Bankruptcy Act of 1898, to disclose his property in his schedules and to claim his exemptions, if the adjudication was on a voluntary petition, in the schedules filed therewith, and in an involuntary proceeding within ten days after adjudication.

In the *Matter of Gerber*, 186 Fed. 693, this Court, in an opinion written by the late Judge Ross, said:

“While the exemption right in the case in hand depends upon the statutes of Washington, as had already been said, the manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act. In *re Friedrich*, 100 Fed. 284; In *re Mayer*, 108 Fed. 599. And the Supreme Court, by virtue of the bankruptcy act, has prescribed the time and manner of preferring such claims. No. 38 of the General Orders in Bankruptcy, so prescribed, provides:

“‘That the several forms annexed to these general orders shall be observed and used.’ 32 C. C. A. xxxvii, 89 Fed. xvi.

“And the official form so annexed requires, among other things:

“‘A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.’

“General Order 17 (32 C. C. A. xix, 89 Fed. viii), which defines the duties of the trustees, requires him to ‘make report to the court within twenty days after receiving the notice of his appointment,

of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report.'

"Section 47 of the act, referred to in the order last quoted, also defines the duties of the trustees, which duties include the direction to (11) 'set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court as soon as practicable after their appointment.'

"And Form 47 * * * prescribed by the Supreme Court requires the trustee to set forth in the report which is thereby required of him a schedule of the 'property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.'

"The rules and forms so prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law, and it therefore seems to us to result necessarily that the bankrupt here, even though it should be conceded that he was not limited to the species of property specified in the statute of Washington as hereinbefore indicated, lost any right he may have had to the exemptions claimed, by his failure to make the claim in the manner and within the time legally prescribed therefor. And it has been so decided. *In re Von Kern* (D. C.), 135 Fed. 447; *In re Blanchard*, 161 Fed. 793; *In re Prince & Walter*, 131 Fed. 546; *In re Duffy*, 118 Fed. 926; *In re Staunton*, 117 Fed. 507; *In re Haskin*, 109 Fed. 789; *In re Wunder*, 133 Fed. 821;

In *re* Pfeiffer, 155 Fed. 892. See, also, *Moran v. King*, 111 Fed. 730, 49 C. C. A. 578.

“It also results from what has been said that the bankrupt was not entitled to the cash allowance in lieu of provisions and fuel.

“The judgment is reversed, with directions for further proceedings in accordance with the views above expressed, and with costs in favor of the petitioners and against the respondent.”

In *Brant v. Mayhew*, 218 Fed. 422, at page 427, this Court said:

“In certain cases where the bankrupt prior to bankruptcy has conveyed his property for the purpose of giving a fraudulent preference, or to conceal the property in fraud of creditors, and thereafter the trustee in bankruptcy, for the benefit of the creditors has, by his own action, recovered the property, it has been held that there can be no claim of homestead exemption, since the trustee has restored to the estate property which, but for his efforts, would have passed both from the bankrupt and his creditors. In *re* Coddington, 126 Fed. 891; In *re* Evans, 116 Fed. 909; In *re* White, 109 Fed. 635; In *re* Tollett, 105 Fed. 425; In *re* Long, 116 Fed. 113; In *re* Wishnefsky, 181 Fed. 896. These decisions are based upon the ground that to permit the bankrupt thereafter to claim exemptions would be to allow him to take advantage of his own wrong, or on the ground that he can have no right to extend his claim over that to which he has no title, except through the intervention and instrumentality of the trustee. But in the present case no preference was made, and there was no fraudulent transfer. In good faith Mayhew and his wife had con-

veyed all their property to an assignee for the benefit of all creditors. Bankruptcy ensued before the assignee accepted the trust, and he at once released to the trustee in bankruptcy. Such a voluntary conveyance *for creditors* can have no effect upon the right of the bankrupts thereafter to claim the exemptions provided by law. The effect of the bankruptcy and the transfer of the property by the assignee to the trustee in bankruptcy was to leave the estate as it would have been if there had been no such voluntary conveyance." (Italics ours.)

Circuit Judge Ross, who had written the opinion of the Ninth Circuit in the *Gerber* case, dissented from this opinion as being in direct conflict with the Eighth Circuit decision in *In re Youngstown*, 153 Fed. 98. *In Brant v. Mayhew*, the bankrupt had acted in good faith, making a general assignment for *all* of his creditors.

See also

In re Hupp, 48 F. 2d 159.

In the case at bar, District Judge Mathes has found the bankrupt to be a party to a corrupt fraudulent transfer to a near relative and the Referee has found that she concealed this property from her Trustee in bankruptcy and made no effort to assert a homestead right against it until, to use a slangy term, she and her daughter were smoked out and compelled to disgorge it, and she now seeks the aid of a court of equity to allow her an interest in the loot recovered which she could not by any stretch of the imagination have recovered herself.

In *Martin v. Oliver*, 260 Fed. 89 (C. C. A. 8th Cir.), the Court said:

“Finally, a court of bankruptcy is a court of equity and it administers the law in the spirit of equity. One cannot read the record that was before the court below and that is before this court, without a strong conviction that the petition for an adjudication in bankruptcy and the application for the exemption of this property was another attempt of the bankrupt, like her making of the fraudulent mortgage to Ruble and her endeavor to ship all her property permanently out of the State to Meade Oliver, by the use of the bankruptcy court to hinder, delay and to defraud the accommodation surety into paying her debt, and to prevent him from obtaining repayment. A Federal court of equity ought not to permit itself to be used for the purpose of perpetrating a fraud or attaining an inequitable result which a State court is successfully endeavoring to prevent. *Zeitinger v. Hargadine-McKittrick Dry Goods Co.* (C. C. A. 8th Cir.), 719.”

See also

Matter of Rogers, 45 Fed. Supp. 297;

Matter of Raggosino, 38 Fed. Supp. 53;

Hyman v. Stern, 43 F. 2d 666 at 668.

And even in a criminal case where a witness has testified for the Government and has not testified that stolen property transported in interstate commerce was in excess of \$5000.00 value and thereafter made an affidavit to the effect that it was worthless, the Court is justified in casting grave doubt on the veracity of the statements made in her subsequent affidavit. (*United States v. Ricciardi*, 88 F. 2d 416 at 417 and 418.)

Conclusion.

We do not see how this Court can do anything else but reverse the District Judge in this case. Were the bankrupt possessed with the slightest degree of honesty, there might possibly be some justification or excuse for the Court below invoking technicalities in her behalf, but such is not the case here. Ruth Vena Johnson's bankruptcy throughout its entire history beginning in April, 1947, over four years ago, has been surrounded by an over-ripe aroma, anything but pleasing to the nostrils of any person whose conscience has the slightest conception of distinction between right and wrong. After "taking" Harry V. Mooney of San Francisco for over \$10,000.00 and additional creditors for another \$48,000.00, this bankrupt realized that Mooney, for one, was not going to take it lying down. She hurriedly disposed of the home on Drexel Avenue, in which she was living, and on which she had theretofore filed a declaration of homestead, with the idea of frustrating Mooney's attempt to collect his money. As found by Judge Mathes, such other assets as she possessed were concealed by her, either on her person or in the names of corporations, and she was thus effectually stripped of every asset to which Mooney could look in the collection of his claim. (*Buffum v. Barcloux Co.*, 289 U. S. 227.) She falsely swore in her schedules in bankruptcy that she owned no real estate nor any interest in land [Tr. p. 6], nor any property in reversion, remainder, trust or expectancy [Tr. p. 5] which would pass to the Trustee. Upon discovery of her fraudulent conveyance of this property and after the Trustee had failed to make a report setting aside this, or any, property as exempt, [Tr. pp. 59-60] by reason of her concealment, suit was instituted to recover the prop-

erty when the facts ultimately came to light. The bankrupt took full charge of the fight, first retaining Attorney Rupert B. Turnbull, who filed answers on behalf of all of the defendants, including the bankrupt. She discharged him from the case the morning of the trial and took charge of the active defense herself. Her fraud, and the evidence thereof, was so conclusive that when she appealed to this Court from an adverse judgment she did not even attempt to challenge the sufficiency of the evidence to sustain Judge Mathes' strong findings against her but relied entirely upon the contention that she had been deprived of her constitutional right to a jury trial, in conformity with her belated demand the morning of the trial. (See *Johnson, et al. v. Gardner*, 179 F. 2d 114.) This Court affirmed the judgment of Judge Mathes and the United States Supreme Court denied certiorari and the judgment became final. Then when the Trustee attempted to clean up the mess that she had made of the title to this property, in order to get a policy of title insurance for the buyer at the bankrupt sale, by reason of the fact that he had to join her in this proceeding under the eighteen or nineteen different aliases behind which she had been masquerading, she filed an answer from Tehachapi, California Institution for Women, where she was serving a term of imprisonment for conviction of another one of her nefarious felonies. Referee Brink, following the law, declined to permit her at that late stage of the proceeding to come in and claim a homestead exemption in property which had been recovered by the Trustee and which she could not have recovered back from her daughter in one hundred years. Judge Yankwich reversed the Referee, and in doing so, we submit, went contrary to every established conception of the law,

completely overlooking the fact that a Court of Bankruptcy is a court of equity and will not aid in the perpetration of a fraud. (See *Martin v. Oliver, supra.*) The District Judge held that she was entitled, now that we had undone her numerous wrongs against her creditors, to a homestead exemption of \$7500.00 out of the recovery.

We respectfully submit that the holding of the District Judge is contrary to every concept of law in the following respects:

1. In her sworn schedules the bankrupt disclaimed any interest in this property whatsoever and is now estopped from changing her position at her convenience after the Trustee has recovered the same.

2. That the bankrupt has not come into the District Court, or before the Referee, with clean hands and is not entitled to any consideration or relief from a court of equity to assist her in furthering the wrong committed against her creditors or to grant her any relief.

3. That the judgment of Judge Mathes avoiding the fraudulent conveyance and decreeing that the property in question belonged to the Trustee, having become final, is conclusive and *res judicata* and that the District Court erred in ignoring the effect of Judge Mathes' decree, which, with his findings of fact and conclusions of law, was in evidence in this proceeding.

4. That Judge Yankwich went absolutely contrary to the plain provisions of Section 1243 of the Civil Code of California in holding that the bankrupt had not executed a grant of said homesteaded property when she conveyed it to her daughter, notwithstanding the fact that, as be-

tween the parties to the conveyance, the grant was absolute and binding.

5. The District Judge further erred in going squarely contrary to the Amendment of 1938 to Section 6 of the Bankruptcy Act which expressly provides that a bankrupt shall not be allowed an exemption out of property which the bankrupt has transferred or concealed and which was recovered, or the transfer of which was avoided, under the act for the benefit of the estate. Notwithstanding the abstruse reasoning he has indulged in, the fact remains that the Bankruptcy Act absolutely governs where a claim of exemption is made to property of an estate in bankruptcy which has been fraudulently conveyed or concealed.

6. Lastly, the District Judge erred in fixing the value of the bankrupt's exemption at \$7500.00. The declaration of homestead was filed in 1944, at which time Section 1260 of the Civil Code of California fixed the exemption of a married bankrupt or head of a family at \$5000.00. In the first place, there was no evidence that the bankrupt was married or the head of a family at the time she filed the declaration of homestead in 1944. In 1945, the statute was amended to provide a \$6000.00 homestead exemption to the head of a family, and a subsequent amendment raised it to \$7500.00. The District Judge arbitrarily allowed the bankrupt a \$7500.00 exemption in property under a statute which provided a maximum of \$5000.00 in 1944, and this we submit constituted additional error.

We have referred the Court to the opinion of the late Judge Ross of this Court in the *Matter of Gerber*, 186 Fed. 693, but we would like to quote from the language

judgment against him. It is too well established to require even discussion that if the judgment creditor's rights expired by virtue of the Statute of Limitations and the debtor then decided it was to his best interests to get his property back, he could not be heard to go into the Superior Court and file suit against the fraudulent transferee, setting up in his complaint that the transfer was made without consideration and with intent to hinder, delay or defraud his creditor, but now that the Statute of Limitations had run against the creditor, he was entitled to his property back. Under well established rules of law, such a complaint would be promptly thrown out of court and the dishonest debtor would apparently be without a remedy. (12 Cal. Juris., Fraudulent Conveyances, page 1026, citing *Donnelly v. Reese*, 141 Cal. 56; *Alaniz v. Casenave*, 91 Cal. 41, and numerous other cases in Note 16.) However, under the holding of the District Court in this case, the dishonest knave would not be entirely frustrated. If he owed other creditors, all he would need to do would be to file a petition in bankruptcy, let his Trustee know that he had made this fraudulent conveyance, and the Trustee could then invoke the provisions of Section 67 or Section 70 of the Bankruptcy Act, recover the property, and the bankrupt could then step in and clean up on the proceeds, for his own benefit, on the ground that the property so transferred would have been exempt under State law. Such a situation, in the writer's opinion, would be unconscionable and we are certain that this Court will not tolerate the type of conduct that this bankrupt has indulged in, in this latest vexatious litigation.

tion any more than it did in affirming the judgment of Judge Mathes setting the transfer aside and decreeing the Trustee to be the owner of property which the bankrupt now claims at the eleventh hour belongs to her. (*Johnson, et al. v. Gardner*, 179 F. 2d 114.)

We respectfully submit that the order of the District Judge should be reversed and the order of Referee Benno M. Brink affirmed, to the end that this bankrupt's vexatious litigation be terminated—at least during our lifetime.

Respectfully submitted this 12th day of September, 1951.

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